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Proportionality and Federalization

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ARTICLE

PROPORTIONALITY AND FEDERALIZATION

Stephen F. Smith*

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INTRODUCTION

THE one thing that almost everyone can agree on about federal criminal law—everyone, that is, outside the employ of the U.S. Department of Justice—is that it is a mess. If asked to explain why, most would probably point to the “federalization” of crime—the fact that Congress has passed so many crimes as to obliterate the distinction between federal and state criminal law. Crime rates rise and fall, but the federal criminal code always gets larger, more expansive, and more punitive. Much of this unrelenting growth, and much of federal enforcement activity, has been aimed at activities that are vigorously prosecuted at the state level, such as violent

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crime and drug trafficking. Even in areas outside of traditional state enforcement, the expansion of the criminal code has seemed to be driven by politics rather than by a demonstrated need for expanded coverage. In short, the problem with federal criminal law is that there is too much of it.

The problem with this response is not that it is wrong. Indeed, I think it is exactly right. The difficulty with the standard arguments against the federalization of crime is that they point to a disease for which there is no cure. Framing federalization as a quantitative problem, as the literature does, leaves only two possible solutions: either Congress must repeal large portions of the federal criminal code, or the United States Supreme Court must declare them unconstitutional. No one thinks either prospect is likely, and for good reason. Congress and federal prosecutors have irresistibly strong political and institutional incentives to continue expanding the federal criminal code, and the Constitution, as presently interpreted, has little to say about it. To the extent that federalization, understood as a quantitative problem, is what ails federal criminal law, the prognosis is grim indeed.

If, however, we look past the size of the federal criminal code, other problems come into focus. This Article will focus on one such problem, a problem that is qualitative rather than quantitative: the

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2 Both points are explored in two characteristically insightful articles by Professor William Stuntz. See William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505 (2001) [hereinafter Stuntz, Pathological Politics]; William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1 (1997) [hereinafter Stuntz, Uneasy Relationship]. Looking beyond the "surface politics" of criminal law, Stuntz identifies a "deeper politics, a politics of institutional competition and cooperation, [that] always pushes toward broader liability rules." Stuntz, Pathological Politics, supra, at 510. The Constitution not only fails to counteract this dynamic; it actually promotes it, albeit unintentionally. Instead of regulating substantive criminal law (that is, what can and cannot be criminalized, and how crimes must be defined), the Constitution regulates criminal procedure. This is perverse, says Stuntz, because "[c]onstitutionalizing procedure, in a world where substantive law and funding [of indigents' criminal defense] are the province of legislatures, may tend to encourage bad substantive law and underfunding." Stuntz, Uneasy Relationship, supra, at 6. Even under the Rehnquist Court's "New Federalism," the Court has shown no interest in reining in Congress's repeated incursions into the domain of state criminal law. See Richard W. Garnett, The New Federalism, the Spending Power, and Federal Criminal Law, 89 Cornell L. Rev. 1, 35 (2003). Viewed as a quantitative matter, in short, federalization is a problem without a constitutional "fix."
drift of federal criminal law away from the principle that criminal punishment is founded upon moral blame. Concerns about blameworthiness drive the nearly uniform scholarly condemnation of federalization. There is the abiding sense among academics and judges that federal criminal law is out of kilter with any sense of moral proportion: minor infractions are often treated as serious crimes, and all crimes, both serious and trivial, are punished with remarkable severity.3

In other words, federal criminal law does not simply replicate in federal court outcomes that would otherwise occur in state courts. Instead, it produces fundamentally different—and fundamentally worse—results. The claim here is that the qualitative problems associated with federalization, unlike their quantitative counterpart, are ones that courts can and should solve, and that restoring moral blameworthiness to its rightful place would make federalization less objectionable in practice.

Criminal law has traditionally rested on the notion that moral blameworthiness dictates the outcome of criminal cases. That is to say, blameworthiness determines two questions: who may be criminally punished and how much punishment may be inflicted on convicted offenders. First, no one should be convicted of a crime unless his act or omission was morally blameworthy.4 A defendant

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3 Few would disagree with the following assessment by a leading federal criminal law scholar:

[S]imilarly situated offenders now receive radically different sentences in federal and state court. The mismatch between the wide sweep of the federal criminal statutes and the relatively limited federal resources—both prosecutorial and judicial—virtually guarantees the continuation of this disparity among offenders who are similarly situated in every respect except one: whether they are prosecuted in state or federal court.

Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 982 (1995); see also, e.g., Stuntz, Pathological Politics, supra note 2, at 544 (arguing that “federal defendants may well be, on average, less culpable than local defendants”).

4 See, e.g., Herbert L. Packer, The Limits of the Criminal Sanction 66 (1968) (noting the “criminal law’s traditional emphasis on blameworthiness as a prerequisite to the imposition of punishment”). For purposes of this Article, the phrase “moral blameworthiness” has its conventional meaning: An act is morally blameworthy, and hence eligible for criminal punishment, if it violates community standards of morality (in which case the act is “morally culpable”) or is the kind of act that citizens would expect to be illegal (in which case the act is “legally culpable”). See John Shepard Wiley, Jr., Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpre-
guilty of a blameworthy act or omission deserves to be branded publicly for his transgression, thereby "convert[ing] into a permanent final judgment what might otherwise be a transient sentiment [of societal condemnation]." Second, blameworthiness serves to delimit the amount of punishment that can be imposed upon conviction. To be justified, criminal punishment should be proportional to the blameworthiness of the defendant's offense; those who are convicted should be punished in accordance with their degree of fault.

The thesis of this Article is that proportionality of punishment has become a casualty of federalization and that the federal courts helped kill it. The federal courts like to portray themselves as the victims in the vicious cycle of federalization, left defenseless in the face of rapacious efforts by Congress and the Department of Justice to use the federal criminal code for their own selfish ends. The federal judiciary repeatedly complains that its judges are overburdened with criminal cases that belong in state court. This is the story the leading lights in the academy have accepted: Congress is responsible for politicizing criminal law and making it so broad as to delegate to federal prosecutors the real lawmaking power in the federal system. No responsibility is laid at the doorstep of the federal courts. This, in my view, lets the federal courts off too easily.

85 Va. L. Rev. 1021, 1026–29 (1999) (referring to this definition as "conventional").

2 James Fitzjames Stephen, A History of the Criminal Law of England 81–82 (London, MacMillan 1883); see also, e.g., Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 404 (1958) (identifying as the key element of criminal liability "the judgment of community condemnation which accompanies and justifies its imposition").

6 See, e.g., William H. Rehnquist, Congress is Crippling Federal Courts, St. Louis Post-Dispatch, Feb. 16, 1992, at 3B (arguing that the federal judiciary "cannot possibly become federal counterparts of courts of general jurisdiction . . . without seriously undermining their usefulness in performing their traditional role"). Chief Justice Rehnquist has regularly delivered that urgent message to Congress on behalf of the Judicial Conference of the United States, to no avail.

7 Stuntz, for example, attributes the remarkable breadth and depth of criminal law (at both the federal and state levels) to "tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges," who "cannot separate these natural allies." Stuntz, Pathological Politics, supra note 2, at 510. See also, e.g., Beale, supra note 3, at 983 (arguing that the "explosion of new federal criminal statutes . . . significantly impairs federal judges' ability to perform their core constitutional functions in civil cases"); Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 Hast-
Far from being innocent bystanders in the federalization of crime, federal judges have been all too willing to construe federal crimes expansively, without regard to the often dramatic effects expansive interpretations will have on the punishment federal defendants face. The root of the problem is that the courts view themselves as having an obligation to ensure that no morally blameworthy defendant ever slips through the federal cracks. In focusing on the culpability of the conduct for which prosecutors seek to convict, courts lose sight of the disproportional effects of the penalties to which their expansive interpretations often expose federal defendants. The inevitable result of how courts approach their interpretive tasks is a broader and more punitive federal code.

Expansive constructions of criminal statutes have expanded the number of defendants eligible for prosecution in federal court. This encourages federal prosecutors, subject to resource constraints, to shift defendants from state court, where more lenient and more flexible sentencing policies apply, into federal court, where sentencing is anything but lenient or flexible. Furthermore, given that federal courts have tended to construe statutes broadly, even when doing so dramatically increases the punishment for a particular kind of crime, the punishment for federal defendants will be higher than it otherwise would have been. Thus, the federal courts have consistently made federal criminal law broader and more severe than necessary, and, indeed, broader and more severe than even Congress may have intended.

Once the responsibility of the courts for the breadth and severity of federal criminal law is appreciated, it becomes apparent that there is a ready solution to the problem other than repealing or invalidating whole swaths of the federal code. All that is required is that courts adjust their interpretive strategies to the realities of a federalized system of crime and give greater emphasis to the goal of preventing punishment not justified by moral blameworthiness. By doing so, courts can help right what is so fundamentally wrong with federal criminal law.

ings L.J. 1135, 1166 (1995) ("If the federal justice system is to function effectively and continue to dispense justice, the legislative and executive branches of government must exercise restraint.").
This Article will propose three interpretive solutions to disproportionate severity in federal sanctions and the overbreadth of the federal criminal code. First, courts must specifically take the potential for disproportionate punishment into account in deciding whether to interpret ambiguous criminal statutes broadly or narrowly. This is particularly vital given contemporary limitations on sentencing discretion. With little possibility for leniency at the back end of the criminal process as a safety valve for less culpable defendants convicted of serious crimes, it is imperative that courts take proportionality concerns into account at the front end of the process—namely, the interpretive stage.

If courts are to preserve the option of broadly construing federal crimes, they must pay close attention to the penal consequences of their interpretive decisions. The penalties available under state law and other applicable federal statutes can and should be used as the benchmark for the proportionality inquiry. Criminal statutes should be interpreted narrowly when an expansive reading would bring into federal court conduct that otherwise would be subject only to lesser sanction in state court. A narrow reading is also appropriate when a broad interpretation would take conduct that is already a crime under one or more federal statutes and bring it within the ambit of a more severely punished crime. To expand a more severely punished crime to include conduct for which Congress specifically provided lower penalties elsewhere would risk disproportionate punishment. The common theme is that courts should not interpret ambiguous statutes in ways that drive up the legislatively prescribed punishment for a criminal act.

Unfortunately, as this Article will document, the phenomenal growth of federal criminal law over the last century does not inspire confidence that courts can reliably discern whether statutes should be construed broadly or narrowly. Indeed, given how myopically courts focus on culpability to the exclusion of proportionality, there is every reason to think that courts will consistently err in favor of expanding the reach of ambiguous statutes. This leads to the second proposed solution.

The second proposal, simply put, is that the courts reinvigorate the much-maligned “rule of lenity.” The rule of lenity requires courts to construe ambiguous criminal statutes narrowly, in favor of the defendant. There is nothing new, of course, about the rule of
lenity, which has been a feature of Anglo-American law for centuries. What is new is the notion that courts should re-ground the rule in its original purpose of counteracting the severity of criminal sanctions. Courts, determined to ensure that for every crime of any significance there will be a remedy (or multiple remedies) in federal court, have consistently opted for severity rather than lenity in the interpretation of federal crimes. The cure for that problem is a consistently enforced rule of lenity requiring that courts always construe ambiguous penal statutes narrowly absent contrary direction from Congress. This solution would restore lenity to the privileged place it held in English common law as a device for counteracting unjustified severity in criminal sanctions.

Third, courts should treat specific criminal statutes as exclusive of general ones. Under current law, prosecutors can exploit the redundancy of the federal criminal code to increase the penalty the defendant faces and, in effect, to redefine crimes. In addition to turning legislative supremacy in crime definition on its head, this state of affairs is replete with dangers of disproportionate punishment. When Congress focuses specifically on a concrete class of criminal behavior, it is more likely that the penalty for that behavior will accurately reflect the seriousness of that behavior. When, however, Congress does not have a good sense of the range of behaviors that it is criminalizing—as it will not when a crime is defined in vague terms and courts later expand the statute to include other kinds of behavior that Congress may not have had in mind—it is far less likely that the punishment prescribed will "fit" the crime. Indeed, the opposite is more likely. For these reasons, courts should adopt an exclusivity principle requiring federal prosecutors to use the most specific criminal statute applicable to the criminal act for which they seek to convict.

The remainder of this Article will proceed as follows. Part I will briefly note the role that moral blameworthiness plays on both retributive and utilitarian theories of punishment. Part II will introduce blameworthiness as a two-dimensional concept. The claim is that the Court does an adequate job of addressing one dimension of blameworthiness (limiting punishment to morally blameworthy conduct) but an abysmal job of addressing the other (limiting the amount of punishment in accordance with blameworthiness). Part III will document the claim that federal criminal law allows dispro-
portionately harsh punishment for federal defendants and that the
interpretive strategies employed by the courts have taken a federal-
ized system of crime and made it worse. Part IV will chart the
path to change, identifying a number of interpretive strategies that
must be altered to counteract federalization and its tendency to
sacrifice proportionality. By adopting the suggestions outlined and
defended in Part IV, the federal courts can restore a long overdue
measure of proportionality to federal criminal sanctions without
blazing new and unlikely trails in constitutional law.

I. THE ROLE OF MORAL BLAMEWORTHINESS IN CRIMINAL LAW

This Part is brief because it covers matters as to which there is
wide agreement among criminal law scholars. There are two gen-
eral schools of thought on the purposes served by criminal punish-
ment: "retributivism" and "utilitarianism." Retributivism is a deon-
tological theory positing that persons who choose to commit
morally blameworthy acts deserve punishment, and it is their moral
"desert" that justifies punishing them. In contrast, utilitarians be-
lieve that moral blameworthiness does not justify punishment. In-
stead, punishment may be imposed instrumentally only, where and
to the extent necessary to avert future social harms.

Moral blameworthiness, all would agree, is central to retributive
theories of punishment, but what about utilitarianism? Utilitarians
do not accept moral blameworthiness as the justification for pun-
ishment, but they do not dismiss blameworthiness as irrelevant ei-
ther. To the contrary, blameworthiness is an "important limiting
principle" in deciding who should and should not be punished on utilitarian grounds. Utilitarians also agree with retributivists on

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5 See, e.g., Michael Moore, Placing Blame: A General Theory of the Criminal Law 91 (1997) ("Retributivism is a very straightforward theory of punishment: We are jus-
tified in punishing because . . . offenders deserve it.").

6 See, e.g., Jeremy Bentham, An Introduction to the Principles of Morals and Legis-
punishment in itself is evil. Upon the principle of utility, if it ought at all to be admit-
ted, it ought only to be admitted in as far as it promises to exclude some greater
evil.").

7 Packer, supra note 4, at 66–67. Even Oliver Wendell Holmes, who viewed crime
prevention as "the chief and only universal purpose of punishment," cautioned that
his claim "[wa]s not intended to deny that criminal liability . . . is founded on blame-
the need for proportionality." As a recent article explains, both theories "suggest similar distributions of liability and punishment" because "a criminal law based on the community's perceptions of just desert is, from a utilitarian perspective, the more effective strategy for reducing crime." Thus, utilitarians should be just as troubled as retributivists by disproportionately harsh criminal sanctions.

II. PROPORTIONALITY, STATUTORY INTERPRETATION, AND THE CONSTITUTION

As the prior discussion suggests, moral blameworthiness is a two-dimensional concept in criminal law theory: it determines both who can be punished and how much punishment can be imposed on the guilty. This next Part demonstrates that courts tend to focus on culpability to the exclusion of proportionality when interpreting federal criminal statutes. This tendency is strange given that disproportionately severe punishments are just as offensive to notions of justice, and just as harmful to the moral credibility of the criminal law, as punishing blameless acts. Disproportionately severe punishment, like punishment of blameless conduct, involves the in-

worthiness." Oliver Wendell Holmes, Jr., The Common Law 46, 50 (Boston, Little, Brown & Co. 1881).

11 For example, to H.L.A. Hart, the legislature's "guiding principle" in grading offenses should be "proportion," meaning a "commonsense scale of gravity" based on "very broad judgments both of the relative moral iniquity and harmfulness of different types of offence." H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 25 (1968). At sentencing, proportionality was also to govern. Id.

12 Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453, 454 (1997). They go on to explain that "every deviation from a desert distribution can incrementally undercut the criminal law's moral credibility, which in turn can undercut its ability to help in the creation and internalization of [social] norms and its power to gain compliance by its moral authority." Id. at 478. See generally Tom R. Tyler, Why People Obey the Law 178 (1990) (reporting results of a study finding that people "obey[] the law if it is legitimate and moral"). To have moral credibility in the eyes of the public, the criminal law "ought to adopt rules that distribute liability and punishment according to desert, even if a non-desert distribution appears in the short-run to offer the possibility of reducing crime." Robinson & Darley, supra, at 477-78. For interesting discussions of the relevance of blameworthiness to utilitarian theories of punishment, see Albert W. Alschuler, The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next, 70 U. Chi. L. Rev. 1, 15-19 (2003); Louis Michael Seidman, Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control, 94 Yale L.J. 315, 334-46 (1984).
fliction of punishment that is not morally deserved. Both results, therefore, are equally to be avoided in a system that seeks to allocate punishment in accordance with blameworthiness.

The Supreme Court has a satisfactory record—lately, at least\textsuperscript{13}—of construing federal statutes to exempt morally blameless conduct from criminal condemnation. Current federal mens rea doctrine is a good illustration. Under a series of cases dating back to Liparota v. United States,\textsuperscript{14} the Court has determined the mens rea for federal crimes by examining whether heightened mens rea requirements are necessary to avoid convicting what Liparota described as "innocent conduct."\textsuperscript{15} By "innocence" the Court has in mind not an inquiry into whether the conduct fits within the literal definition of a crime, but rather an a priori, unabashedly moral approach to assessing blameworthiness: The question is whether conduct that would otherwise be a crime deserves punishment. When that question is answered in the negative, the Court uses heightened mens rea requirements to hardwire into the definition of the crime judicially enforceable protections for blameless conduct. Thus, in Liparota, the Court held that the government cannot convict a defendant for misuse of food stamps unless he knew that he was violating federal food-stamp regulations\textsuperscript{16}—a tough standard, to be sure, but one considered vital to ensure that blameless conduct would escape punishment.

The Court has also taken moral innocence into account in construing the actus reus of federal crimes. A good example is Bronston v. United States.\textsuperscript{17} Bronston involved a perjury prosecution for testimony which, although literally true, was nonresponsive to the question asked and given with intent to mislead. Even though Bronston himself was blameworthy—he did not tell the "whole truth" as witnesses swear to do—the Court narrowly interpreted

\textsuperscript{13} For a striking counterexample, a fitting candidate for inclusion in the federal criminal law "Hall of Shame," if there ever was one, see United States v. Dotterweich, 320 U.S. 277 (1943) (holding that corporate managers can be convicted for food-and-drug violations by subordinates even if the managers could not have known of such violations).

\textsuperscript{14} 471 U.S. 419 (1985).

\textsuperscript{15} Id. at 426. For an insightful examination of Liparota and its progeny, see Wiley, supra note 4, at 1034–53.

\textsuperscript{16} 471 U.S. at 433.

\textsuperscript{17} 409 U.S. 352 (1973).
the perjury statute as exempting literally true testimony from prosecution. It did so because the "perjury through literal truth" crime the government was asking the Court to create could ensnare morally blameless witness behavior. The Court understood that it made no sense to expand the perjury statute to convict Bronston at the cost of allowing conviction of morally blameless witnesses in other cases.

Although the Court thus does consider culpability in construing federal crimes, it earns a failing grade on proportionality issues. As Part III makes clear, the Court almost invariably construes criminal statutes expansively when the conduct in question is blameworthy, even when doing so threatens punishment in excess of blameworthiness. One might be tempted to say that when culpability and proportionality conflict, culpability wins. To put the point that way, however, gives the courts entirely too much credit because it is far from apparent that courts are even aware that proportionality is a relevant concern in interpreting federal crimes.

Return to the example of federal mens rea doctrine. The Court decides mens rea issues by asking whether the conduct is "innocent" or, in a competing formulation, "inevitably nefarious." Either way, the point is that the Court is looking at moral blameworthiness as a one-dimensional, binary concept: conduct is either blameless or blameworthy. The second dimension of blameworthiness, proportionality, receives no mention whatsoever in the mens rea cases. Not surprisingly, the leading scholarly treatment of these cases says only that they "shield blameless conduct from criminal condemnation." Once proportionality of punishment is taken into account, however, it becomes clear that the proper approach is not just to require culpability but to require enough culpability to make

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18 The Court explained that "[u]nder the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive." Id. at 358–59. Similarly, in Williams v. United States, 458 U.S. 279 (1982), a case involving a massive check-kiting scheme, the Court rejected the government's contention that writing a bad check constitutes a false statement to a bank, in violation of 18 U.S.C. § 1014 (2000). The Court did so in part because "many people understand a check to represent that the drawer will have sufficient funds deposited in his account by the time the check clears, or that the drawer will make good the face value of the draft if it is dishonored by the bank." Williams, 458 U.S. at 286 n.7.
19 Liparota, 471 U.S. at 426.
21 Wiley, supra note 4, at 1023.
the sanctions provided by the statute commensurate with the defendant's degree of fault. So far at least, the Court has yet to endorse this principle, which suggests that the Court has simply overlooked proportionality.

This raises the question: Why does the Court give proportionality such short shrift when interpreting federal crimes? Two possible reasons are apparent. Neither reason justifies ignoring proportionality when interpreting criminal statutes.

One reason is that the Court may regard the concept of proportionality as so malleable as to be incapable of principled judicial administration. Even though, without question, proportionality is incapable of precise definition, legislatures routinely apply the proportionality standard in defining crimes, and judges routinely apply it at the sentencing stage of every criminal prosecution. It is also the standard that determines whether criminal sanctions are so extreme as to be unconstitutional and, in the civil context, whether a punitive damages award is so high as to violate due process.

The most common formulation of the proportionality standard in the criminal context is that the punishment authorized by the legislature and imposed by a court must "fit" the crime committed by the defendant. Although the Court has experienced difficulty

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24 See, e.g., Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in judgment). As the formulation in the text suggests, inquiries into proportionality call for a common-sense assessment of the gravity of the offense in light of the penalties authorized for it and for other crimes. This inquiry is reflected in the Supreme Court's traditional test of the proportionality of noncapital criminal sanctions. That test directed courts to consider "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii)
using proportionality as a standard for assessing the constitutionality of prison terms, the use of proportionality as an interpretive principle would be far less problematic. To the extent that proportionality has proven problematic in the constitutional context, it is because subjective standards make it impossible for legislatures to know what penalties are, and are not, constitutional and because it is undesirable for the constitutional powers of legislatures to turn on the subjective views of judges.25

Using proportionality as an interpretive principle would be fundamentally different. It would not diminish legislative power or result in ex ante uncertainty over whether penalties are simply severe or so severe as to be unconstitutional. As an interpretive principle, proportionality would merely require courts to err on the side of leniency if a criminal statute is ambiguous. Congress therefore would remain free, subject to existing constitutional limitations, to prescribe whatever penalty it deems appropriate for a criminal act, provided it does so in clear and unambiguous terms.

Another possible reason why courts fail to consider proportionality in resolving interpretive questions is that they might believe that the Constitution affords adequate protection against the possibility of disproportionately severe penalties. Such a belief, however, would be mistaken. For all practical purposes, the Court is out of the business of using the Constitution to regulate the proportionality of prison sentences other than life imprisonment. The proportionality standard applied in recent Cruel and Unusual Punishments cases is so stringent that, as Professor Karlan notes, it “essentially foreclos[es] relief in contemporary cases.”26 If the task of

the sentences imposed for commission of the same crime in other jurisdictions.” *Solem*, 463 U.S. at 292. Cases since *Solem* have held that the Constitution does not require “‘strict proportionality’ of punishment and that only “grossly disproportionate” noncapital sanctions are constitutionally suspect. *Ewing*, 538 U.S. at 23–24 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

25 For an argument to this effect, see Pamela S. Karlan, “Pricking the Lines”: The Due Process Clause, Punitive Damages, and Criminal Punishment, 88 Minn. L. Rev. 880, 882–83 (2004) (arguing that constitutional proportionality review “remains fundamentally subjective”).

26 Karlan, supra note 25, at 884. The only case in which the Court invalidated a term of imprisonment other than life, *Weems v. United States*, 217 U.S. 349 (1910), came decades before the Court adopted the current stringent standard of gross disproportionality and involved a sentence of “painful as well as hard labor,” not just a prison
preventing disproportionate punishments is left to the Constitution, such punishments will remain with us for a long time—which makes it essential that courts give proportionality considerations a prominent place in the interpretation of federal criminal statutes.

III. JUDICIAL RESPONSIBILITY FOR DISPROPORTIONATELY HARSH FEDERAL SANCTIONS AND THE FEDERALIZATION OF CRIME

The goal of proportionality in punishment is under serious pressure in the federal system. The argument here is not the standard complaint that federal punishments are too severe or that the rigidity of the federal sentencing guidelines (and of legislative mandatory minimum sentences) leave district judges no choice but to impose disproportionately harsh sentences. This Article, instead, focuses on a serious threat from another source, one that is actually within the control of the courts themselves yet has been ignored: the puzzling practice of courts taking ambiguous criminal statutes and interpreting them expansively. If, as so many academics and judges believe, the penalties authorized by Congress are often too severe, and sentencing discretion is no longer an adequate vehicle for mitigating the severity of federal punishments, then the worst thing the federal courts could do would be to construe federal criminal statutes broadly. To do so, after all, would expand the reach of the statutes and exacerbate the problem of disproportionately harsh punishments. This might occur in at least two ways.

First, expansive constructions of federal criminal statutes allow federal prosecutors to shift more offenders from the state system into the federal system. This shift will often have dramatic penal consequences because states generally take more lenient, flexible, and creative approaches to sentencing than the federal system.
Second, the willingness of federal courts to interpret criminal statutes broadly creates the danger that defendants guilty of comparatively minor federal crimes will be swept into, and sentenced under, other federal criminal statutes carrying considerably harsher penalties.

The need for courts to be attentive to the penal effects of their interpretive decisions is even more imperative given existing federal sentencing policies. Before the advent of the Sentencing Guidelines, district judges had full discretion to confer leniency on defendants who, though guilty of an offense, were less culpable than other offenders. When broad sentencing discretion existed, expansive interpretations of federal criminal statutes would not necessarily result in disproportionate punishment even if the maximum penalty far exceeded those available in state court or under federal statutes dealing with the same behavior. The stigmatic harm of conviction for a serious crime would remain, of course, but judges had broad latitude to impose no jail time or a prison sentence well below the maximum.

The picture became quite different in the 1980s. From that time forward, Congress has dramatically limited judicial sentencing discretion. In 1984, Congress replaced the traditional federal system of discretionary, individualized sentencing with a rigid, “one-size-fits-all” system in which judges would derive sentences based on mechanical point calculations prescribed in mandatory sentencing guidelines. Those guidelines are no longer binding after United States v. Booker, but, as the Booker Court predicted, they will un-

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in state court—often ten or even twenty times higher”); Steven D. Clymer, Unequal Justice: The Federalization of Criminal Law, 70 S. Cal. L. Rev. 643, 674 (1997) ("[S]ome federal laws, most notably those dealing with drug trafficking and weapons offenses, require imposition of harsh statutory mandatory minimum sentences which can be as long or longer than the maximum sentences permitted under some state laws.“ (footnote omitted)); Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. 591, 605, 631–35 (1996) (explaining that states rely more heavily on expressive alternatives to imprisonment than the federal system); Kay A. Knapp & Denis J. Hauplty, State and Federal Sentencing Guidelines: Apples and Oranges, 25 U.C. Davis L. Rev. 679, 681–82 (1992) (explaining how most state guidelines are more flexible and less severe than the federal guidelines). For a useful overview of the ways in which federal penalties, sentencing policies, and substantive law are more disadvantageous to defendants than state law, see Clymer, supra, at 668–75.

doubtedly "continue to move sentencing in Congress' preferred direction."

That direction, of course, is away from leniency and flexibility and toward severity and rigidity.

Moreover, even though the guidelines are no longer binding, statutory mandatory minimums still exist. There are approximately one hundred different provisions in the federal criminal code imposing mandatory minimum sentences, and a number of these provisions concern the frequently prosecuted areas of drug and weapons offenses. The impact of these provisions is far greater than their number would suggest. For example, between 1984 and 1991 alone, "nearly 60,000 cases" were sentenced pursuant to mandatory minimums. The continued proliferation of mandatory minimums is a significant obstacle to proportionality in sentencing. As even a defender of tough federal sentences recognizes, "many of the[] 'horror stories' [in federal sentencing] stem from mandatory

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31 125 S. Ct. 738, 767 (2005). It is easy to see why. Under Booker, district judges must do more than simply "consult [the] Guidelines"; they must actually "take them into account when sentencing." Id. This mandate, coupled with the fact that "the Sentencing Commission remains in place, writing Guidelines," and that appellate courts stand ready to overturn sentences that they consider "unreasonable," makes it unlikely that post-Booker sentences will diverge significantly from Guidelines sentences. Id. This is particularly so given that the Justice Department has announced that it will "actively seek" sentences in conformity with the Guidelines and report to Congress judges who impose more lenient sentences. Memorandum from Deputy Attorney General James B. Comey, to All Federal Prosecutors, Department Policies and Procedures Concerning Sentencing 23 (Jan. 28, 2005) (on file with the Virginia Law Review Association). Although it remains too early to be definitive, the early indications are that district judges are still generally sentencing within, or close to, the applicable Guidelines range. See generally United States v. Peach, No. C4-04-003, 2005 WL 352636, at *3 (D.N.D. Feb. 15, 2005) (citing "early data from the Sentencing Commission" finding that "most federal judges continue to follow the Guidelines" and that the "percentage of cases sentenced within the Guidelines range post-Booker does not appear to differ from the past practice in district courts" when the Guidelines were binding). For a detailed statistical analysis of post-Booker sentences, see Memorandum from Linda Drazga Maxfield, U.S. Sentencing Commission Office of Policy Analysis, to Judge Ricardo H. Hinojosa, Chair, and Tim McGrath, Staff Director (Mar. 22, 2005) (on file with the Virginia Law Review Association).


33 Id. at 12.
minimums in general and from narcotics mandatory minimums in particular.\textsuperscript{34}

With these features dominating the federal sentencing landscape, judicial sentencing discretion is no longer a reliable means of avoiding disproportionately severe punishment. The real sentencing power in the federal system is being wielded, not by judges, but rather by prosecutors who, for obvious reasons, have strong institutional incentives to prefer severity to leniency.\textsuperscript{35} The current repressive approach to sentencing gives added importance to narrow-construction principles in general, and, in particular, to paying close attention to the maximum penalty the defendant will face upon conviction, in determining the scope of federal criminal statutes.

\textit{A. Moving State Offenders into the Federal System}

This Section discusses instances in which broad readings of criminal statutes have shifted into federal court entire categories of crimes that could otherwise be prosecuted only in state court, where considerably lesser punishment would usually apply. For two reasons, the number of such instances is necessarily small today.

The first reason is the breadth of federal criminal law. There is enormous overlap between federal and state criminal law, which means that few categories of crime recognized at the state level will not be crimes at the federal level as well.\textsuperscript{36} The second reason is the depth of federal criminal law. When a type of crime is regulated at


\textsuperscript{35}For an explanation of how limits on judicial sentencing discretion translate into largely unbounded prosecutorial power to dictate sentences, see generally Marc L. Miller, Domination & Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211 (2004).

\textsuperscript{36}See Daniel C. Richman, The Changing Boundaries Between Federal and Local Law Enforcement, in 2 Criminal Justice Organizations 81, 91 (2000) (stating that, measured in terms of substantive coverage, the overlap between federal and state criminal codes is “virtually complete”). Richman argues that there are nevertheless unwritten boundaries between the two systems, emanating from negotiations between federal and state prosecutors in each jurisdiction as to the kinds of cases that should “go federal” and those should be handled “stateside.” See id. at 91–96.
the federal level, rarely is there only one applicable statute. The usual situation is that a multiplicity of federal statutes will be violated by a single criminal act.\textsuperscript{37} As such, it would be a minor miracle for someone to violate just one federal criminal statute. Consequently, it will rarely be the case today that whether or not a particular crime can be prosecuted federally will turn on the interpretation of a single federal statute.

That said, however, there are some striking examples. This Section focuses on two of them: sex crimes and bribery involving state and local officials. In both situations, the courts expansively interpreted the federal statutes at issue, bringing into federal court entire categories of crimes that otherwise would have been prosecuted only in state court. The courts did so even though the federal penalty was disproportionate to the culpability of the offense as measured by the maximum penalty under state law or closely analogous federal statutes, and, in some cases, both.

1. Sex Crimes

The classic historical example of courts moving entire categories of more leniently prosecuted crimes into federal court is the Mann Act, also known as the White Slave Traffic Act. As passed in 1910, the Mann Act made it a federal crime to "transport . . . in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."\textsuperscript{38} As its colorful title suggests, the Act was aimed at prohibiting "traffick-


ing” in females, but the language Congress used extended far beyond that laudable objective. The question for the Supreme Court was how broadly the catch-all phrase (“any other immoral purpose”) should be interpreted.

On the one hand, the phrase might be read narrowly so that, for example, it could be applied only in cases having a nexus to organized crime or involving some form of “trafficking” in women. On the other hand, a number of broader interpretations were also possible. The statute might be read as granting federal agents authority to prosecute illicit sex other than prostitution or “debauchery,” such as sex among unmarried persons (called “fornication” in the language of the day) and adultery. At its broadest, the phrase “for any . . . immoral purpose” would allow federal prosecution of any interstate movement of any female for any purposes—whether related to sex or not—that a jury might condemn as “immoral.” The meaning of the Act had decisive implications for the reach of federal criminal law because, apart from the Act, prostitution and other forms of extramarital sex would not be a federal crime unless it occurred on a military base or other federal enclave.

The Supreme Court interpreted the catch-all phrase broadly. In *Caminetti v. United States*, the Court was faced with prosecutions of men for transporting their lovers across state lines. All were convicted and jailed for between eighteen months and two years. Believing the law to be unambiguous, the Court rejected the defendants’ contention that the Act was limited to cases of “commercialized vice”; in its view, the catch-all phrase plainly included adul-

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39 See, e.g., H.R. Rep. No. 61-47, at 9–10 (1909) (“The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. It . . . aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter into . . . a life of prostitution.”).

40 For an elaboration on these and other interpretive possibilities under the Mann Act, see Peter W. Low, Federal Criminal Law 322 (2d ed. 2003).

41 See infra note 51. Federal enclaves are places within the exclusive jurisdiction of federal law, and so in those areas federal criminal law operates to the exclusion of state law. State crimes, however, can often be “borrowed” as the basis for punishing misconduct on federal enclaves. See Assimilative Crimes Act, 18 U.S.C. § 13 (2000); Major Crimes Act, 18 U.S.C. § 1153(b) (2000).

42 242 U.S. 470 (1917).
tery and fornication. The dissent, by contrast, would have limited the catch-all phrase to commercialized vice.

The consequences of the Caminetti decision were substantial. For the first time, federal prosecutors were empowered to police sexual mores nationwide. The Justice Department aggressively used this new authority over the ensuing decades and, quite ironically given the stated purpose of the law, many Mann Act prosecutions involved private consensual sex, not prostitution. This authority remains in place today despite subsequent statutory revision.

Caminetti had a dramatic effect on the punishment for adultery and fornication. To be sure, these forms of extramarital sex were crimes in many states. They were nevertheless typically treated as minor crimes and, presumably, as crimes that were to be enforced only rarely, if at all. The punishment under the Mann Act was far

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43 Id. at 484–86. Although Caminetti broadly interpreted the catch-all phrase "any other immoral purpose," it assumed, based on ejusdem generis, that the phrase was limited to sexual immorality. Id. at 487. Under ejusdem generis, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Norman J. Singer, Statutes and Statutory Construction § 47:17, at 273-81 (6th ed. 2000).

44 242 U.S. at 502 (McKenna, J., dissenting).


46 The Mann Act was amended in 1986, just shy of its eightieth anniversary, to make the statute gender-neutral. The amendment replaced the outmoded concept of "debauchery" and the catch-all phrase with more modern language. See Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510, 3511 (codified at 18 U.S.C. § 2421 (2000)) (prohibiting interstate transportation of a person "with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense").

47 This can be seen by looking at the penalties that would have been available had Caminetti and his co-petitioners been prosecuted in state court. The conduct at issue in the cases consolidated in Caminetti (adultery in two instances and fornication in the third) took place, or was to take place, in three states: Kansas, Nevada, and Oklahoma. In Kansas, the maximum penalty for adultery at the time was six months in jail; fornication carried the same penalty but was a crime only if it involved cohabitation or "open, gross lewdness, or lascivious behavior." See Kan. Gen. Stat. § 3615 (1915). In Nevada, adultery and fornication were, under similar circumstances, treated as gross misdemeanors. See Rev. Laws of Nev. § 6460 (1912). In Oklahoma, fornication does not seem to have been a crime apart from seduction through unkept promises of marriage; adultery, however, was punishable by up to five years in prison. See Okla. Stat. art. 31, § 1843 (1921) (seduction), § 1853 (1921) (adultery). The comparative severity of Oklahoma's adultery law was mitigated by the rule that an adultery prosecu-
more severe: a felony conviction carrying up to five years in prison. That level of punishment undoubtedly would have been appropriate for the organized prostitution rings at which the Act was aimed. That penalty, however, was disproportionate for consensual extra-marital sex in light of the much lower penalties provided for such conduct under state law.48

Contrary to the view of the Caminetti majority, the statute did not require its expansive interpretation. The key to limiting the statute to more sensible bounds, and thereby averting the danger of disproportionately harsh punishment for consensual extramartial sex, lay in the principle of ejusdem generis. Prostitution and "debauchery" involved not just illicit sex, but \textit{open and notorious} sexual misconduct. Prostitutes typically plied their trade on the public streets, in "red-light districts," brothels, or other places said to be "of ill-repute." Likewise, debauchery, apparently a synonym for raucous orgies,49 was, by its nature, difficult to conceal.

The open and notorious nature of prostitution and debauchery had special implications for the stated legislative objective of protecting women from being "enslaved" in lives of prostitution. When the Mann Act was passed, women who had lost their reputation for "chastity" were social outcasts who, with significantly diminished opportunities for marriage, might well find themselves destitute. Women in such dire circumstances, the moral crusaders of the day feared, might be forced into lives of prostitution, a predicament described at that time as a form of "slavery."50 The slide-

\begin{footnotesize}
48 Additionally, the maximum punishments under the Mann Act for adultery and fornication were substantially in excess of the penalties Congress itself had authorized for those specific offenses under then-existing federal enclave laws. Under those laws, which were repealed in 1948, fornication was punishable by no more than six months' imprisonment, and adultery by up to three years. 18 U.S.C. § 516 (adultery) (repealed 1948); id. § 518 (fornication) (repealed 1948). Caminetti therefore made the federal penalty for adultery and fornication dependent, not on the act involved, but rather on where it took place.


50 See generally Langum, supra note 45, at 125–28. On the use of the term "slavery" in the early 1900s to describe the situation of women trapped in lives of prostitution,
Proportionality and Federalization

into-prostitution story breaks down if the woman's sexual affairs remain private. In that event, the woman's social standing, and her prospects for marriage, would be unaffected.  

If the foregoing reasoning is correct, then the Caminetti Court could have exempted consensual extramarital sex from the ambit of the catch-all phrase without doing violence to the statutory text. Having accepted the notion that ejusdem generis warrants limiting the catch-all phrase to illicit sex, the Court could have used that same interpretive principle to limit the statute to the kinds of illicit sex that were most likely to "enslave" women in lives of prostitution. The question thus arises: Why was the Court so willing to expand the reach of the Mann Act?

The most plausible reason is that the Justices made the mistake of viewing the case solely in terms of moral blameworthiness. Given the mores of the early 1900s, extramarital sex would undeniably be morally culpable because such conduct was widely regarded as immoral. It would also be legally culpable because sex outside of marriage was so thoroughly criminalized at the state level that a normally socialized person could intuit that it would likely be illegal. This is of critical importance in understanding the interpretive posture assumed in Caminetti.

When the conduct the government seeks to prosecute is necessarily wrongful, the usual reasons given for strictly construing criminal statutes—fair warning, separation of powers, and federalism 2 —will often be viewed as having considerably weakened force. After all, the more deplorable the conduct is, the more likely it is

see Anne M. Coughlin, Of White Slaves and Domestic Hostages, 1 Buff. Crim. L. Rev. 109, 112 (1997) (explaining the term "white slavery" in terms of the "physical, psychological, and social shackles that bind prostitute to pimp").

5 As a 1911 government report noted, such a woman "has her fling and then settles down to quiet living" in marriage. Langum, supra note 45, at 128–29 (quoting report commissioned by the Commissioner of Labor). Of course, the moralists of the day argued that any extramarital sex by women began the more-or-less inevitable slide into prostitution, id. at 127–28, and the government explicitly asserted in its Caminetti brief that any woman who engages in extramarital sex is "a prostitute in the making." Id. at 130 (citing Brief for the United States at 17, Caminetti v. United States, 242 U.S. 470 (1917) (Nos. 139, 163, 464)). The short answer to this line of argument is that there is no reason to believe that Congress, which disclaimed any intent to "regulate[e] ... immorality" or "the practice of voluntary prostitution," shared those views. See H.R. Rep. No. 61-47, at 9–10 (1909).

that the defendant should have been on notice that his conduct was a crime. Also, the likelihood that Congress would have wanted criminal punishment increases as the culpability of the behavior in question rises. Moreover, seriously deplorable conduct is highly likely to be criminalized already under state law, which supports the existence of fair warning and makes it more likely that Congress would have likewise intended to criminalize the behavior. It therefore comes as no surprise that the prosecution prevailed in *Caminetti*: its interpretation criminalized only wrongful behavior, and thus the Court saw no reason to limit the statute.

By focusing myopically on the blameworthiness of the behavior the government sought to prosecute, the Court overlooked another critical inquiry related to blameworthiness—namely, whether the penalties for Mann Act violations were proportional to the culpability of extramarital sex. When the proportionality question is taken into account, the case for a narrow interpretation in *Caminetti* becomes considerably stronger. As previously shown, Mann Act violations carried significantly heavier penalties than adultery and fornication did under state law and federal enclave law. This suggests that Congress did not have extramarital sex in mind when it passed the Mann Act.

Admittedly, *Caminetti* is a historical example. The activity that the Court swept within the Mann Act is no longer prosecuted in federal court. Nonetheless, the case remains valuable, not just as an example of the penal consequences that expansive interpretations have produced in the federal system, but also for what it teaches us about how courts facing contemporary interpretive questions should approach their task. When broadly interpreting a criminal statute would substantially increase the penalties that would otherwise apply, courts would be wise, given the recognized importance of proportionality of punishment, to insist on clear language from Congress before doing so. As *Caminetti* vividly illus-

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53 See supra notes 47–48 and accompanying text.
54 This was true even before the 1986 amendments narrowed the statute to "illegal" (as opposed to "immoral") sexual activity. See Langum, supra note 45, at 175–76, 215–16 (noting that, within a decade after *Caminetti*, Mann Act enforcement efforts shifted from adultery and fornication to organized prostitution); id. at 242 (explaining that the Mann Act went "virtually unenforced in noncommercial [that is, non-prostitution] settings, except for rape," from the early 1960s onward).
trates, courts all too often succumb to the temptation of broadly construing ambiguous criminal statutes to ensure that no offenders will slip through the federal cracks. By doing so, courts worsen federalization when they should be counteracting it.

2. State and Local Bribery

Bribery is another illustration of how broad interpretations of ambiguous criminal statutes have brought into the federal system categories of crimes that would otherwise have been subject to lesser sanctions in state court. Although Congress has long criminalized bribery and gratuities offenses involving federal officials, bribes involving their state and local counterparts were generally within the sole province of state criminal law. As far as federal law was concerned, state and local officials could be prosecuted for bribery only if the bribes pertained to their participation in federal programs or performance of official functions on behalf of the federal government. Otherwise, bribery involving affairs of state and local government was within the sole province of state criminal law.

The federal courts, however, were quick to fill this gap. From the 1940s until 1987, when the Supreme Court rejected the “intangible-rights doctrine” of mail and wire fraud, the lower courts gave

56 The federal program bribery statute, 18 U.S.C. § 666 (2000), covers bribery of state and local officials if their agency “receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.” Id. § 666(b). Section 201(a), the bribery statute applicable to federal officials, also applies to state and local officials to the extent they are acting as agents of the federal government. See Dixon v. United States, 465 U.S. 482, 496 (1984). With the enactment of the Travel Act, 18 U.S.C. § 1952 (2000), and RICO, 18 U.S.C. §§ 1961–1968 (2000), the coverage of bribery involving state and local affairs was expanded as part of the war on organized crime.
57 McNally v. United States, 483 U.S. 350, 358–60 (1987). McNally rejected decades of precedent in the circuits holding that undisclosed corruption, self-dealing, or conflicts of interest by fiduciaries can be prosecuted as mail and wire fraud. Id. The theory of the cases was that such activities “defraud” others of “intangible rights” (such as an employer’s right to the “honest services” of employees or the right of voters and citizens to have elections and governmental affairs conducted honestly and impartially). See generally Norman Abrams & Sara Sun Beale, Federal Criminal Law and Its Enforcement 131–33 (3d ed. 2000) (noting that the intangible-rights cases “substantially extended the concept of fraud” because the element of deception was
prosecutors free reign to use the doctrine to prosecute bribery at the state and local level. This dramatic expansion of the fraud statutes, though controversial for the reasons that led to its rejection in McNally v. United States, was not objectionable from the standpoint of avoiding disproportionate punishment. The punishment for mail and wire fraud throughout this period was five years, which, when compared to the usual range of penalties for bribery under state law and under federal bribery statutes, was hardly excessive.

Federal prosecutors evidently thought that five years was not harsh enough and so, in a stroke of ingenuity, began prosecuting...
bribery as a form of “extortion” under the Hobbs Act.® Proceeding under the Hobbs Act had several advantages from the standpoint of federal prosecutors, not the least of which was a severe twenty-year maximum punishment.® In Evans v. United States,® the Supreme Court endorsed decades of lower-court precedent upholding this creative use of the Hobbs Act.

Evans, a prosecution of a county commissioner who accepted a bribe in connection with a local zoning matter, involved two questions. The first was whether bribery could constitute extortion. The second was whether the reference to “inducement” in the statutory definition of extortion precluded prosecution where the public official passively accepted a bribe. The Court resolved both questions in favor of the government.

What is so striking about the case is the length to which the majority went to expand the reach of the Hobbs Act. The common-law treatment of extortion and bribery, which the majority and dissent debated at length, was unclear at best and thus did not compel the majority to treat passive acceptance of a bribe as a form of extortion.® Indeed, the definition of extortion expressly states that the victim’s consent to surrendering money or property must be

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® 18 U.S.C. § 1951 (2000). The Hobbs Act makes it illegal for anyone to “affect[] commerce” in any way “by robbery or extortion.” Id. § 1951(a). Extortion, in turn, is defined as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” Id. § 1951(b)(2). Official-right extortion, unlike “force, violence, or fear” extortion, can only be committed by a public official or by someone masquerading as a public official. The first appellate case to endorse the notion that official-right extortion could encompass bribes by public officials was United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972).

® A further advantage of using the Hobbs Act is that the required jurisdictional nexus is broader than those specified by other federal statutes applicable to such bribery. Unlike those statutes, which specify particular jurisdictional elements that must be proven in order to convict, see supra note 56, the Hobbs Act allows federal prosecution even when those elements are missing, provided that the government can show some minimal impact on commerce.


® See id. at 269–71; id. at 280–84 (Thomas, J., dissenting). Noting that there were “substantial arguments” on both sides of that debate, Justice O’Connor sensibly declined to take a position on the relationship between extortion and bribery at common law. Id. at 272 (O’Connor, J., concurring in part and concurring in the judgment). To be sure, Congress is presumed to intend common law meaning when it uses common law terms. That presumption, however, only makes sense if the term had an established meaning in the common law.
“induced” by some action on the part of the extortionist—namely, “induced . . . under color of official right.” To say the least, the requirement of inducement does not easily accommodate passive acceptance of a bribe.

The inducement requirement does make sense in the broader context of robbery and the other offenses created by the Hobbs Act. These offenses, without exception, require active use by the defendant of wrongful, coercive means to obtain the victim’s money or property. Seen in light of these other offenses, it only made sense to treat extortion under color of official right as involving a different kind of wrongful coercion—namely, the power of public office—to force people to surrender their money or property.

The majority, however, took a different approach. In its view, the inducement requirement either did not apply to extortion under color of official right, or, if it did, “the wrongful acceptance of a bribe establishes all the inducement that the statute requires.” No claim was made (or could have been made) that the text or legislative intent compelled the Evans outcome.

The case for an expansive interpretation was stronger in Evans than in Caminetti, but not by much. Federal regulation of state and local corruption can be justified as a check against the possibility that local law enforcement might itself be corrupt or reluctant to take on corruption by powerful forces in state and local government. Although that line of reasoning might justify federal regulation of state and local corruption, it does not necessarily justify using the Hobbs Act for that purpose. The Court’s decision to do so in Evans makes sense only from the narrow perspective of making sure that federal prosecutors can convict any and all culpable defendants. Bribery is, by American standards at least, seriously wrongful behavior, and so expanding the Hobbs Act to cover bribery poses no danger of convicting morally blameless conduct. The

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66 Robbery requires the defendant to use “actual or threatened force, or violence, or fear of injury,” id. § 1951(b)(1), and extortion requires “force, violence, or fear.” Id. § 1951(b)(2). The point is even clearer with the other crime created by the Hobbs Act, for the defendant must “commit[] or threaten[] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.” Id. § 1951(a).
67 Evans, 504 U.S. at 266.
absence of such danger, however, is not a sufficient reason for expansively interpreting the Hobbs Act, given the separate, equally important goal of avoiding disproportionately harsh punishment.

From the perspective of preventing disproportionate punishment, a narrow interpretation would have clearly been the better course in *Evans*. Some states treat bribery as a very serious crime, but in many other states, the maximum punishment for bribery is ten years or less. The penalty under the Hobbs Act (twenty years) is thus higher than the penalty for bribery in many states. In addition, the Hobbs Act penalty is considerably higher than the penalty Congress authorized for bribery involving federal officials and state officials acting on behalf of the federal government (fifteen years) and twice the penalty Congress provided for state and local officials under the federal program-bribery statute (ten years). Even if Congress might have viewed bribery at the state and local level as worse than bribery at the federal level (which is dubious), there is absolutely no reason to believe that Congress would have deemed state and local bribery in *state and local matters* to be so much worse than state and local bribery in *federal programs* as to warrant double the punishment. *Evans* vividly illustrates the disproportionate punishment—not to mention illogical outcomes—that can result when courts, blinded by the culpability of the conduct for which the government seeks to convict, expand the reach of ambiguous federal statutes and bring into federal court defen-

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68 See, e.g., N.Y. Penal Law § 200.04 (McKinney 1999) (twenty-five-year maximum); Tex. Penal Code Ann. § 36.02 (Vernon 2003) (twenty-year maximum). The stiff twenty-five-year maximum under New York law applies only to bribery schemes in which the official act involves the investigation, detention, or prosecution of persons suspected of having committed the most serious grade of felonies. N.Y. Penal Law § 200.04. Apart from such bribery schemes, the maximum punishment under New York law is fifteen years, and even then that maximum applies only if the benefit offered or solicited is “valued in excess of ten thousand dollars.” Id. § 200.03. Lesser bribes are punishable by no more than seven years in prison. Id. § 200.00.

dants who otherwise would have been subject to prosecution only in state court.

B. Excessive Punishment for Federal Defendants

The previous Section dealt with the potential for disproportionate punishment that can arise when federal courts broadly construe criminal statutes to encompass conduct otherwise regulated solely by state criminal law. This Section deals with the same basic problem in a far more common situation: overlapping federal criminal statutes prescribing different penalties for a particular kind of crime. Some degree of redundancy across crimes is inevitable and unobjectionable. For example, physical attack that can be prosecuted as assault and battery can also constitute homicide if death results. Although these crimes overlap, they protect victim interests of differing weight, and the penal consequences of prosecuting a fatal beating as murder instead of assault, though dramatic, are justified by the fact that death resulted and by the defendant's seriously culpable state of mind in inflicting the beating. Redundancy thus is not necessarily problematic in and of itself.

What is problematic is allowing prosecutors to exploit the redundancy of federal criminal law to drive up the penalties Congress prescribed for a particular offense. Time and again, courts have either created or exacerbated redundancies across criminal statutes by broadly construing generic federal statutes carrying higher penalties to encompass conduct subject to lower penalties under federal statutes specifically regulating the type of conduct at issue. In these contexts, the incremental punishment is determined solely by an arbitrary factor—namely, the prosecutor's choice of which statute to invoke⁷⁰—rather than differences in culpability or

⁷⁰ In those circumstances, prosecutors will naturally charge the offense that will generate the highest sentence regardless of whether that sanction is commensurate, morally speaking, with the defendant's culpability. Indeed, except in certain limited enumerated circumstances, they are required to do so by Department of Justice policy. See Memorandum from Attorney General John Ashcroft, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing 2 (Sept. 22, 2003) [hereinafter Ashcroft Memo] (on file with the Virginia Law Review Association). The fact that federal prosecutors are duty-bound to pursue the most serious charge refutes any suggestion that prosecutorial discretion is a sufficient safeguard against disproportionately severe punishment.
a considered legislative judgment that higher penalties are warranted for that type of behavior.

1. RICO

The Racketeer Influenced and Corrupt Organizations Act ("RICO") was passed in 1970 to give federal prosecutors effective tools for fighting organized crime. Instead of punishing the commission of discrete crimes, an approach that had proven ineffective at bringing down organized-crime rings, RICO made it a crime to use a "pattern of racketeering activity" for certain prohibited purposes (to gain an interest in, or conduct the affairs of, any "enterprise" engaged in or affecting commerce). Specifically, RICO made it a crime to acquire or maintain an interest in an "enterprise" through dirty money or dirty methods, or, in cases where racketeers are already in some sense inside an "enterprise," to carry out its affairs through a pattern of racketeering activity.

The evident purpose of the statute is clear: to protect "enterprises" against being infiltrated and put to criminal uses by organized crime. That explains why the commission of racketeering crimes does not violate RICO unless it is directed against an "enterprise" or involves use of an "enterprise" to commit a pattern of racketeering activity. It also explains the structure of Section 1962:

72 "Racketeering activity" includes a laundry list of serious federal and state crimes that were believed to be typical of organized crime. See 18 U.S.C. § 1961(1). Obvious examples include murder, extortion, bribery, loansharking, drug trafficking, and prostitution. A RICO charge, however, cannot be established simply by the commission of racketeering activity; the activity must be sufficiently related and continuous to constitute a "pattern." A "pattern of racketeering activity" requires "at least two acts of racketeering activity . . . within ten years (excluding any period of imprisonment)." Id. § 1961(5). "Enterprise" is defined, unhelpfully, as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Id. § 1961(4).
73 See id. § 1962(a) (making it "unlawful for any person who has received any income . . . from a pattern of racketeering . . . to use or invest . . . such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise").
74 See id. § 1962(b) (prohibiting use of "a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise").
75 See id. § 1962(c) (declaring it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity"). It is also a crime to conspire to violate subsections (a)–(c) of § 1962. See id. § 1962(d).
subsections (a), (b), and (d) prohibit racketeers from using or conspiring to use the methods of organized crime, or money generated through such methods, to gain a toehold in an “enterprise,” and subsection (c) is the completed offense in which the “enterprise” has already not only been infiltrated but corrupted by being used to commit a pattern of racketeering activity. The clear implication is that the “enterprise” was (and, apart from the intervention of organized crime, would have remained) a legitimate organization existing for commercial or other lawful purposes.  

The difficulty, as federal prosecutors soon learned, is that a statute limited to preventing the infiltration and corruption of legitimate entities is not the best way to eradicate organized crime. There is, after all, enough money to be made in purely criminal endeavors so that organized crime will not wither and die if prevented from expanding into legitimate spheres of the national economy. Accordingly, the Department of Justice ingeniously reconceptualized the RICO offense.

On this view, RICO (and especially Section 1962(c)) could be used to prosecute organized crime apart from any efforts to infiltrate legitimate businesses. The theory was that organized crime families or street gangs could themselves constitute an “enterprise” and that directing and otherwise participating in the nefarious affairs of such groups itself violates RICO. The theory (which now represents the dominant approach to RICO) was a considerable

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76 As Professor Peter Low explains:

The paradigm offense, as defined in subsection (c), was distorting the business in which an enterprise could legitimately be engaged (banking, dry cleaning, retail sales, union negotiations, law enforcement) by the use of illegitimate competitive tactics (kickbacks, extortion, bribery, threats, murder). There were two inchoate offenses designed to prevent this ultimate offense from occurring, defined in subsections (a) and (b). Both were acts of infiltration of a legitimate enterprise.

Low, supra note 40, at 587. This understanding is made explicit in the preamble to RICO, which declares that RICO was intended to stop the “money and power” of “organized crime” from being “used to infiltrate and corrupt legitimate business and labor unions.” Pub. L. No. 91-452, § 1, 84 Stat. 922, 922–23 (1970). For a detailed analysis of the legislative history, see Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts I & II, 87 Colum. L. Rev. 661, 673–80 (1987), which finds not even a “glimmer” of evidence that RICO “was intended to impose additional criminal sanctions on racketeering acts that did not involve infiltration into legitimate business.” Id. at 680.
improvement over Congress’s original approach. Clearly, RICO would not have been the success it has been against organized crime had it been limited to the infiltration of legitimate entities.

The point was not lost on the Supreme Court in United States v. Turkette. The case involved a prosecution in which a street gang was the RICO enterprise. The Court, over a solo dissent, rejected the infiltration approach and adopted the prosecution’s more expansive approach. The Court found the broader approach preferable because limiting RICO to infiltration would leave “[w]hole areas of organized criminal activity... beyond the substantive reach of the enactment.” It is hard to imagine a clearer declaration that the Court’s paramount concern was preventing culpable behavior (in this case, racketeering by organized crime) from slipping through the federal cracks. The better way to put organized crime out of business, the Court understood, was to allow prosecutors to “deal with the problem at its very source” instead of forcing them to await infiltration activity. Absent anything in RICO preventing illegitimate groups from constituting “enterprises,” and charged by Congress that RICO “shall be liberally construed to effectuate its remedial purposes,” the Court wholeheartedly endorsed the reconceptualization of RICO.

Very few RICO prosecutions involve attempts at infiltration and corruption of legitimate businesses; the vast majority involve charges under § 1962(c) and related conspiracy charges based on involvement in purely criminal organizations. See Lynch, supra note 76, at 662–63. The effectiveness of the reconceptualization of RICO can be measured in the toll it took on organized crime families nationwide:

By 1989 the steady flow of organized crime RICO prosecutions had resulted in the convictions of a number of organized crime figures: the bosses of the major New York La Cosa Nostra families in the “Commission” case; numerous participants in a massive Sicilian heroin importation ring (the “Pizza Connection” case); and mob bosses in Los Angeles, Cleveland, Kansas City, Philadelphia, Boston, and Newark. Several of these defendants received prison sentences of one hundred years.


Id. at 589.

Id. at 591.

Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) (not codified in the U.S. Code). Although the majority cited the RICO liberal-construction rule, it candidly admitted that the rule was superfluous to the outcome: “With or without this admonition, we could not agree... that illegitimate enterprises should be excluded from coverage.” 452 U.S. at 587 (emphasis added). The concession was wise because § 904(a) does not
The result in Turkette may seem unassailable, but only if the issue is viewed solely in terms of culpability. The balance tips in favor of the opposite result when proportionality of punishment is considered. The effect of Turkette is that crooks who get together to commit two or more crimes can potentially be convicted under RICO. That result, though just applied to highly structured entities like organized crime, creates the danger that garden-variety conspiracies (such as a stick-up man and getaway-car driver who rob a couple of banks) can be prosecuted as RICO violations. This is so because a conspiracy is simply an agreement among two or more people to commit, or assist in the commission of, a crime or series of crimes. Given the breadth of the predicate crimes that trigger RICO (particularly mail and wire fraud), Turkette threw open the door to RICO prosecutions for innumerable conspiracies that otherwise would be prosecuted under ordinary conspiracy law.

The penal effects of allowing RICO to subsume conspiracy law are significant. Under the federal conspiracy statute, the maximum penalty for conspiring to commit a federal crime is five years. RICO, however, allows up to twenty years in prison and asset forfeiture for each substantive violation, and for conspiracy to violate RICO, in addition to the punishment for the predicate crimes that triggered RICO. The reason for the heavy penalties for RICO violations is clear: Congress believed that organized crime is, for a variety of reasons—including its highly structured nature, the vast economic resources at its disposal, and its tendency to infiltrate legitimate sectors of the economy—far more dangerous than ordinary criminal conspiracies. Allowing ordinary conspiracies to be charged as RICO violations, however, subjects ordinary conspira-

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constitute a reverse-lenity rule requiring RICO to be broadly interpreted whenever possible. Instead, a broad interpretation is justified only if the "remedial purposes" of the statute so warrant; otherwise, the rule of lenity should apply. Turkette assumed that the only pertinent "purpose" of RICO was to eradicate organized crime but, for reasons to be discussed in the text, the Court overlooked the fact that another purpose of RICO was to provide a special criminal remedy for a distinctive, and distinctively dangerous, criminal threat—namely, that posed by organized crime and similar entities.

cies to the same draconian penalty that Congress crafted for organized crime. Therefore, Turkette created a serious problem of disproportionate punishment for ordinary conspiratorial behavior.85

The danger is illustrated by the well-known case of United States v. Elliott.86 In that case, prosecutors used RICO to tie together into one "enterprise" six defendants who were or had been involved in a series of twenty smaller conspiracies with dozens of unindicted co-conspirators. A few defendants dealt prescription drugs and other controlled substances, while others stole cars and forged motor-vehicle titles. These conspiracies were ongoing. Also swept into the RICO "enterprise," however, were a number of discrete conspiracies that had already achieved their criminal objectives: arson of a nursing home, numerous thefts from interstate commerce, murder of a government informant, and obstruction of a criminal trial.

There was only one common player in these different conspiracies: J.C. Hawkins. His co-defendants simply assisted him with particular criminal activities as opportunities arose. Importantly, there was no evidence that any of his co-conspirators knew that he was committing crimes with others, much less what those crimes were and who was involved in their commission. Each defendant knew only of the crimes in which he personally participated. Nevertheless, the defendants were tried en masse85 and convicted under RICO.

85 It is fair to say that the Supreme Court has spent the two decades since Turkette trying to solve the problem of disproportionate punishment that it created. The effort began in Turkette in dicta suggesting that a valid associated-in-fact "enterprise" requires "evidence of an ongoing organization, formal or informal, and... evidence that the various associates [comprising the enterprise] function as a continuing unit." Turkette, 452 U.S. at 583; see also, e.g., Reves v. Ernst & Young, 507 U.S. 170 (1993) (limiting § 1962(c) to make it more difficult to convict outsiders and low-level insiders); H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989) (reading "continuity" and "relationship" requirements into the definition of "pattern"); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) (suggesting that two acts of racketeering may not be enough to constitute a "pattern").

86 571 F.2d 880 (5th Cir. 1978).

87 Under ordinary conspiracy doctrine, a trial en masse would not have been allowed. As noted in Elliott, the case involved what would have been viewed as a "wheel conspiracy," in which a number of participants in smaller conspiracies (the "spokes") emanated from a single "hub." Id. at 900. Wheel conspiracies are improper without a "rim" tying the spokes and the hub together into a single wheel; that is to say, without proof that the members of the smaller conspiracies knew of, or partici-
The *Elliott* panel upheld the use of RICO on these facts. The panel conceded that the “enterprise” of Hawkins and his co-defendants bore closer resemblance to “an amoeba-like infrastructure” than a structured outfit like organized crime. The lack of meaningful structure, like the fact that the members of the individual conspiracies did not know about Hawkins’s activities with others, however, did not matter. It was sufficient that all of the defendants constituted part of an associated-in-fact “enterprise” directed by Hawkins operating for a shared criminal objective: “the desire to make money” through racketeering activity. Perhaps recognizing that, under its approach, any conspiracy involving racketeering activity might well constitute a RICO violation, the panel added that the “RICO net” was intended “to trap even the smallest fish” and that whether the statute produces a “moral imbalance” is “a question whose answer lies in the halls of Congress, not in the judicial conscience.”

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The problem is not as bad as it could have been, but not because the Court's subsequent efforts to limit RICO have been effective. Instead, the Department of Justice has been unusually restrained in its use of RICO. Since 1981, Justice Department regulations have denied the regional U.S. Attorneys offices the authority to file RICO charges without prior approval from headquarters in Washington, D.C. The Criminal Division's stated policy is that "RICO be selectively and uniformly used."

Although faith in prosecutorial discretion has arguably been vindicated by extreme restraint in the use of criminal RICO, the course of action pursued in Turkette was, to say the least, dangerous. It created a serious risk of disproportionately severe punishment for ordinary conspiracies bearing little, if any, resemblance to organized crime. Though the risk did not fully materialize, there was no sound reason to take it in the first place. If Turkette had come out the other way, it is almost certain that Congress would have come to the Department of Justice's rescue; simply put, the reconceptualization of RICO as a tool for hitting organized crime directly at the source was essential if RICO was to be optimally effective against organized crime.

Even if a narrow interpretation of "enterprise" in Turkette would have been overturned, it hardly follows that such an interpretation would have been pointless. Particularly with a statute as under RICO) would seem to fit the Fifth Circuit's characterization of the facts in Elliot.

91 U.S. Department of Justice, United States Attorneys' Manual § 9-110.101 (1997). Such preapproval requirements are understandably rare: in the vast majority of situations, prosecutors in the field are free to file criminal charges without prior notice to, much less approval from, their departmental superiors in Washington.

92 Id. at § 9-110.200; see also id. (explaining that "not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved" and that "the Criminal Division will not approve 'imaginative' prosecutions under RICO which are far afield from the congressional purpose of the RICO statute"). The likely reason for the Department's extreme restraint in the use of RICO was the fear that applying a draconian, poorly drafted statute like RICO with the same liberality as other federal criminal laws might prompt courts to invalidate it. That this fear was justified is shown by the fact that, in H.J. Inc., four Justices who typically side with federal prosecutors came dangerously close to endorsing the view that RICO was facially void for vagueness. See H.J. Inc., 492 U.S. at 254-56 (Scalia, J., Rehnquist, C.J., O'Connor, J., and Kennedy, J., concurring in judgment) ("That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when [a vagueness] challenge is presented.")
innovative and as poorly drafted as RICO, it was worthy of a fresh look by Congress based on the lessons learned in the early years of investigations and prosecutions under RICO. In revisiting the statute, Congress would have had the benefit of the Court’s concern that including illegitimate enterprises within RICO would create a serious danger of disproportionate punishment for ordinary conspiracies—a concern that Congress in all likelihood overlooked back in 1970 in its single-minded focus on eradicating organized crime.

When Congress passed RICO, it self-consciously entered uncharted territory. Historically, criminal law has operated by punishing the commission of antisocial acts and omissions, but RICO was a substantial departure from this model. Instead of punishing the commission of racketeering activity, RICO makes it a crime, in Professor (now Judge) Gerald Lynch’s phrase, “to be a criminal”9—or, more fully put, in the business of committing serious crimes in a business-like (that is, organized) way. Infiltration, in the original legislative design, was the most important way of showing that a defendant was in the business of being a criminal: Why would someone invest, for example, in taking over legitimate businesses or buying off a police department unless he was absolutely committed to a life of crime on a major scale?

The beauty of the infiltration approach was twofold. First, it freed Congress from having to define “organized crime,” a problem Congress had struggled with in the years leading up to RICO’s enactment. Organized crime, in effect, defined itself through its efforts to infiltrate legitimate spheres of the economy. Second, it kept most, if not all, ordinary conspiracies, such as the ubiquitous stick-up man and getaway-car driver who rob a few banks, out of RICO. Members of ordinary conspiracies typically do not operate on such a large scale as to need the “cover” of legitimate businesses. Without infiltration activity, the “enterprise” and “pattern” requirements must do all the work in removing ordinary conspiracies from the ambit of RICO, which they are ill-suited to do.94 The disadvantage of the infiltration approach is obvious: it limits RICO to playing “defense” against organized crime when a more effec-

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9 Lynch, supra note 76.
94 See supra text accompanying notes 78–92.
tive strategy is to play "offense" by hitting organized crime before it has the chance to infiltrate.

The Court in Turkette could have sent the matter back to Congress by adhering to the originally intended infiltration approach. Had it done so, the Department of Justice would have certainly alerted Congress to the disadvantages of the infiltration approach. To the extent that the Court's opinion clearly articulated the danger that a RICO stripped of infiltration activity could be used simply as a penalty-enhancer for conspiratorial behavior far removed from organized crime, Congress would have been on notice of this serious problem. Not only would Congress's deliberations have been better informed as a result of a reasoned judicial refusal to reconceptualize RICO, but the chances for an effective legislative solution to the overbreadth problem would also have been maximized. Instead, the Court took the initiative of reconceptualizing RICO on its own and assumed the difficult task of creating limitations on the concepts of "enterprise" and "pattern" to do the work that the requirement of infiltration activity was designed to do. In doing so, the Court eliminated any realistic chance that Congress would limit RICO on its own.

This outcome was particularly unfortunate. Though the Supreme Court has struggled, without much success, to limit RICO to acceptable bounds ever since Turkette, it would have been easy for a Congress apprised of the danger of disproportionate punishment to

95 As a matter of political economy, Congress is highly unlikely to amend a statute solely to narrow its reach. After all, doing so will bring no rewards from a public obsessed with being "tough" on crime and can be expected to provoke opposition by the Department of Justice, which is the most influential interest group in federal criminal law. See Stuntz, Pathological Politics, supra note 2, at 542-46. The more likely situation for legislative action favorable to criminal defendants is when Congress revisits a statute in order to make some other change favored by federal prosecutors. For instance, in 1996, Congress passed the False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459, in response to a Supreme Court decision holding that the federal false statements statute, 18 U.S.C. § 1001, applied only to false statements made to Executive Branch agencies. While amending the statute to extend its coverage to the other branches of government, Congress extended the materiality requirement applicable to some of the false-statement offenses contained in the former § 1001 to those offenses that previously contained no such requirement. By bundling pro-defendant reforms with statutory changes sought by prosecutors, such reforms can actually become law even if they might have failed (or not even been introduced) as stand-alone measures.
have done so by legislation. Now, by virtue of the approach the Court took in Turkette, there is little chance that Congress will ever address this important problem. As a result, there is no protection, other than the good graces of the Department of Justice, against RICO being used as a penalty enhancement for ordinary conspiratorial behavior—behavior for which Congress prescribed significantly lower penalties under the federal conspiracy statute.

2. Bribery, Gratuities, and Extortion

The application of the Hobbs Act to bribery has already been discussed at some length and thus can be treated briefly here. Recall that in Evans v. United States the Supreme Court held that state and local bribery can constitute extortion under color of law. That holding produced a significant effect on the punishment of such bribery, as previously shown. The point to note here is that Evans brought into the Hobbs Act under the rubric of "bribery" a

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96 For example, Congress could have increased the number of predicate acts required for a "pattern" to exist. The closer a case is to the organized-crime side of the conspiracy spectrum, the easier it will be for prosecutors to prove more than two acts of racketeering were committed within ten years. An alternative approach would have been to write into the definition of the RICO offense specific requirements as to how large an illegitimate enterprise must be, either in terms of personnel or revenues, to fall within the statute. This is the approach that Congress took in the so-called "Drug Kingpin" statute. See 21 U.S.C. § 848 (2000). One additional alternative among many would have been for Congress to eliminate from the definition of racketeering activity crimes, such as mail and wire fraud, that are only tangentially related to organized crime. Congress took this approach in a recently enacted racketeering statute. See 18 U.S.C. § 1959 (2000) (limiting covered crimes in aid of racketeering to murder, kidnapping, and other crimes of violence for hire committed at the request of an illegitimate enterprise).

97 See supra notes 61–69 and accompanying text.


99 Less dramatic, but troubling nonetheless, is the effect Evans had on the penalty for bribery involving federal officials. If the federal bribery statute was the sole basis for prosecuting bribery at the federal level, the maximum punishment available would be fifteen years. See 18 U.S.C. § 201(b) (2000). Under Evans, however, bribery involving federal officials can be charged as extortion under color of official right under the Hobbs Act, which carries a maximum of twenty years' imprisonment. See, e.g., United States v. Stephenson, 895 F.2d 867 (2d Cir. 1990). Allowing federal officials to be prosecuted for extortion under color of official right under the Hobbs Act produces yet another strange result: the penalty for such extortion by federal officials, which otherwise would be three years under 18 U.S.C. § 872, increases almost sevenfold to twenty years. See 18 U.S.C. § 872 (2000).
whole category of behavior that Congress graded as far less culpable than bribery or extortion—namely, illegal-gratuities offenses.

Illegal-gratuities offenses are distinguished from, and far less culpable than, bribery. Bribery requires a quid pro quo, or a trade on the officeholder's government position, whereas illegal gratuities may reflect nothing more than an expression of approval of, or gratitude for, an official act that was already performed in the honest exercise of public office. The penalties that Congress provided for bribery and illegal-gratuities offenses clearly reflect the greater seriousness of the former as compared to the latter: bribery involving federal officials is punishable by up to fifteen years (roughly eight times the two-year maximum for illegal-gratuities offenses involving federal officials) and permanent disqualification from future federal office. Accordingly, Congress clearly viewed gratuities offenses as far less blameworthy than bribery.

*Evans* obliterated the distinction between the two crimes and, in doing so, subjected illegal-gratuities offenses to disproportionate punishment. While paying lip service to the quid pro quo requirement as a defining feature of bribery, the *Evans* majority diluted that requirement. Whereas, under federal bribery statutes, the quid pro quo requirement mandates proof of "specific intent to give or receive something of value in exchange for an official act," no such specific intent is required under *Evans*. The *Evans* majority was explicit on this point: "We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."

The phrasing of the knowledge requirement is key because it simply restates the mens rea standard for illegal-gratuities offenses under Section 201(c). As one leading formulation of the elements of the illegal-gratuities offense put it: "[A] violation of Section 201(c)] requires the presence of three separate elements: that the defendant (i) knowingly gave a thing of value; (ii) to a public official or person selected to be a public official; (iii) for or because of

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100 See United States v. Sun-Diamond Growers, 526 U.S. 398, 404–05 (1999) (quoting 18 U.S.C. §§ 201(b) (bribery), 201(c) (gratuities)).
101 Compare 18 U.S.C. § 201(b) (bribery) with id. § 201(c) (gratuities).
102 Sun-Diamond Growers, 526 U.S. at 404–05.
103 504 U.S. at 268.
any official act performed or to be performed.\textsuperscript{104} The \textit{Evans} definition of extortion under color of official right is indistinguishable from the typical formulation of the illegal-gratuities offense. In both cases, the specific intent "to be influenced" in an official act necessary for a bribery conviction is conspicuously absent.\textsuperscript{105} The lack of intent to be influenced makes sense for gratuities offenses because, as one treatise notes, the "gravamen" of such offenses is "not an intent to be corrupted or influenced, but simply the acceptance of an unauthorized compensation."\textsuperscript{106} It makes no sense, however, for bribery, the whole point of which is to punish corrupt bargains in which official acts are traded for private gain.

This nonsensical result is exactly what \textit{Evans} allows. As lower courts have recognized, public officials who accept payments from private parties can be convicted under the \textit{Evans} standard even absent proof that the officials intended to be influenced in an official act.\textsuperscript{107} In other words, \textit{Evans} allows conviction under the Hobbs Act not just for bribery, but also for what amounts to an illegal-gratuities offense.

The sentencing consequences of \textit{Evans} are, by any measure, dramatic. By expanding extortion under color of law to include illegal gratuities, the Court subjected gratuities offenses to the same punishment as bribery under the Hobbs Act. This is directly contrary to Congress's assessment, as reflected in Section 201, that gra-

\textsuperscript{104} United States v. Schaffer, 183 F.3d 833, 840 (D.C. Cir. 1999).
\textsuperscript{105} \textit{Sun-Diamond Growers}, 526 U.S. at 404.
\textsuperscript{106} Sarah N. Welling et al., Federal Criminal Law and Related Actions: Crimes, Forfeiture, the False Claims Act, and RICO § 7.4, at 216 (1998).
\textsuperscript{107} After surveying the caselaw on this point, the Seventh Circuit concluded:

\begin{quote}
We therefore join the circuits that require a \textit{quid pro quo} showing in all [Hobbs Act] cases [involving payments to public officials]. That said, we also agree ... that the government need not show an explicit agreement, but only that the payment was made in return for official acts—that the public official understood that as a result of the payment he was expected to exercise particular kinds of influence on behalf of the payor.
\end{quote}

United States v. Giles, 246 F.3d 966, 972 (7th Cir. 2001). Of course, as an evidentiary matter, intent to be influenced might be \textit{inferred} from proof that an official accepted a payment with knowledge that it was offered for, or because of, a future official act, but absent such an inference such proof alone would be insufficient to convict for bribery. Under \textit{Evans}, however, such proof is \textit{itself} a sufficient basis for conviction, and lack of intent on the part of the official to be influenced (or the existence of reasonable doubt as to the existence of such intent) is no defense.
tuities offenses are far less culpable than bribery. Moreover, allowing gratuities offenses to be prosecuted as extortion produces a ten-fold increase in the maximum punishment Congress provided under the federal illegal-gratuities statute. Gratuities offenses are subject to a two-year maximum under Section 201(c) but twenty years under the Hobbs Act as construed in *Evans*. These substantial increases in punishment all stem from expanding the Hobbs Act to include voluntary wealth transfers to public officials instead of restricting the statute to transfers that are coerced through misuse or misrepresentation of public office.

3. Mail and Wire Fraud

For almost a century, the penalty for mail and wire fraud was no more than five years' imprisonment. That changed in the wake of recent corporate accounting scandals. In 2002, Congress increased the punishment for both offenses to twenty years. The substantial increase in penalty gives prosecutors powerful new incentives to use the mail and wire fraud statutes to ratchet up the punishment offenders would face under other federal fraud statutes.

The mail and wire fraud statutes function as generic antifraud statutes in the federal system. This is due to two factors. First, the jurisdictional triggering events under those statutes—use of the mails and of telephones and other interstate wire facilities—are ubiquitous. It is difficult to imagine any large-scale fraud (or many small-scale frauds) that would not involve some use of the mails or telephones, particularly given how generously the Court has interpreted the jurisdictional requirements for mail and wire fraud.

Second, the central concept behind both statutes—fraud—is unusually flexible. Fraud under the mail and wire fraud statutes can encompass conduct that would not fall within traditional common-law understandings of "fraud" and that may not violate other laws. See *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (holding that it is "sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot'" (citation omitted)).

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109 See, e.g., *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (holding that it is "sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot'" (citation omitted)).

110 See 18 U.S.C. § 1346 (2000); *Durland v. United States*, 161 U.S. 306 (1896). In two post-*Durland* cases, the Supreme Court has looked to common law limitations on
federal antifraud statutes. Therefore, the mail and wire fraud statutes are likely to cover any conduct that falls within other federal antifraud statutes.

This is hardly surprising. Given that the various statutes aim at the same behavior and differ only in their jurisdictional triggering events, overlap is inevitable in cases where multiple such events occur (as they commonly do). Stock transactions may be executed over the Internet, or by telephone, regular mail, or electronic mail. This means that those transactions, if fraudulent, can constitute securities fraud, mail fraud, and wire fraud. Similarly, claims for reimbursement by the federal Medicare program may be submitted by mail, and reimbursement can be made via mail or electronic funds transfers. Consequently, fraudulent Medicare claims can be prosecuted under a panoply of federal criminal statutes: in addition to mail and wire fraud, statutes prohibiting health-care fraud, the submission of false claims to federal agencies, and conspiracies to defraud the United States all potentially apply. Redundancies such as these across crimes are commonplace throughout the federal system.

Therein lies the danger of disproportionate punishment for fraudulent behavior under the 2002 legislation. Few federal antifraud statutes carry penalties as severe as mail and wire fraud now do, and a good number of those statutes provide for considerably lower penalties. Conspiracies to defraud the United States are punishable by five years maximum, as is the filing of false or fraudulent

the concept of fraud. See Neder v. United States, 527 U.S. 1 (1999) (holding that materiality is an implied element in prosecutions for mail fraud); McNally v. United States, 483 U.S. 350 (1987) (holding that the object of a scheme to defraud must be acquisition of money or property, as opposed to intangible rights). In neither case, however, did the Court repudiate the holding in Durland that the mail fraud statute is not limited to common-law understandings of fraud.

11 Carpenter v. United States, 484 U.S. 19 (1987), is the best example. The case involved securities, mail, and wire fraud charges premised upon a scheme by a newspaper reporter and others to misappropriate from the Wall Street Journal and trade upon confidential pre-publication information about publicly traded companies. It was unclear at the time whether such behavior constituted securities fraud (because the victim of the fraud, the newspaper, did not trade in the affected securities), and the Carpenter Court evenly divided on that question. Id. at 24. The fact that the defendants' securities scheme might not violate the securities laws did not prevent the Court from concluding, unanimously, that the scheme fell within the mail and wire fraud statutes. Id. at 28.
claims with federal agencies. The maximum punishment for credit-card fraud and health-care fraud is ten years. In all of these cases, prosecutors can, simply by charging mail and wire fraud violations in addition to, or in lieu of, other antifraud laws, drive up the maximum punishment defendants would otherwise face under federal statutes addressing their specific kind of fraudulent activity.

Unlike the other instances of disproportionate punishment discussed in the previous Sections of this Part, the pervasive problem of overlapping federal crimes was not, strictly speaking, created by the federal courts. The prime culprit is Congress, and the root of the problem is that there are just too many different federal statutes on the books regulating fraud—or, at least, so it would appear. On closer inspection, however, this is yet another example of courts taking a bad situation created by Congress and making it worse. The multiplicity of overlapping crimes is not problematic in itself, nor is it necessarily problematic that such overlapping crimes may be defined or punished differently.

Major problems have arisen in the context of overlapping criminal statutes because of how courts have responded to this situation. Where such overlap exists, courts have held that, absent either a double-jeopardy violation or specific legislative intent to make a particular crime exclusive of other crimes, prosecutors are free to pick and choose among the applicable statutes as they see fit. As with so many other features of federal criminal law, the redundancy of the federal criminal code translates into more lawmaking power—and more sentencing power—for prosecutors. Prosecutors can use their power to select the applicable charge from among overlapping statutes to increase the punishment that the defendant

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114 The Supreme Court has "long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." United States v. Batchelder, 442 U.S. 114, 123-24 (1979). This nonexclusivity rule has been applied to the federal fraud statutes. See, e.g., United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982) (holding that the False Claims Act, 18 U.S.C. § 287, does not impliedly preclude use of the later-enacted mail and wire fraud statutes). Multiple convictions do not violate double jeopardy as long as each crime requires an element that the other does not. See Blockburger v. United States, 284 U.S. 299 (1932).
will face. They can also use strategic charge-selection to evade express limitations in the definition of crimes.

A few examples may help to illustrate the point. Congress made credit-card fraud a serious crime, punishable by up to ten years in prison. Now that mail and wire fraud are twenty-year offenses, allowing those crimes to be used for frauds involving credit cards will double the maximum penalty that Congress specifically prescribed for credit-card fraud. The penal consequences are even more staggering when it comes to the use of mail and wire fraud to prosecute the submission of false claims to federal agencies: the maximum penalty increases fourfold, from five to twenty years. If the ideal of avoiding disproportionate punishment is to mean anything, such dramatic increases in criminal penalties should turn on the culpability of the offense committed by the defendant, not the statute the prosecutor chooses to employ in a particular case.

Credit-card fraud is an example from the literature illustrating how mail and wire fraud can be used to redefine the crime of fraudulent use of credit cards. The credit-card fraud statute does not permit federal prosecution unless the fraud exceeds a specific monetary amount. Presumably, Congress imposed a monetary limit to prevent prosecutors from making a “federal case” out of small-scale frauds involving credit cards. Credit-card authorization and billing, however, invariably involve some use of the mails and interstate wires. As such, prosecutors can evade the monetary limit imposed by Congress by prosecuting fraudulent uses of credit cards below the limit as mail or wire fraud instead of credit-card fraud.

It is not immediately obvious why courts have been so willing to allow prosecutors to exploit the redundancies in federal criminal law, in effect, to redefine crimes and override congressional choices as to the proper penalty for a criminal act. A bedrock principle of American criminal justice is legislative supremacy—the idea that it is for legislatures, not courts or law enforcement, to define crimes. From the vantage point of legislative supremacy, the

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116 Presumably, Congress imposed a monetary limit to prevent prosecutors from making a “federal case” out of small-scale frauds involving credit cards. Credit-card authorization and billing, however, invariably involve some use of the mails and interstate wires. As such, prosecutors can evade the monetary limit imposed by Congress by prosecuting fraudulent uses of credit cards below the limit as mail or wire fraud instead of credit-card fraud.
117 This notion inheres in the “principle of legality.” As one leading treatment summarizes the concept: “The principle of legality... stands for the desirability in princi-
courts' hands-off approach to redundancy in criminal law seems profoundly misguided. If Congress is to be supreme in matters of federal criminal law, why should prosecutors be allowed to exploit the existence of overlapping crimes to override specific congressional policy judgments about the scope of, or proper penalty for, particular crimes? The existence of separate criminal statutes indicates an intent for each such statute to be an independent basis for a federal conviction. Allowing prosecutors to take advantage of overlapping statutes to prosecute behavior that Congress specifically exempted from criminal sanction in other statutes and drive up the penalties that Congress specifically prescribed for particular criminal acts is quite another matter.

C. Synthesis

The lesson of this Section is that federal courts are too often blind to the impact of their interpretive decisions on the punishment criminal defendants will face upon conviction. This is so because, in deciding whether to construe criminal statutes broadly or narrowly, courts tend to give undue emphasis to whether or not the conduct the government seeks to prosecute is morally blameworthy. Where the conduct in question is blameworthy, courts are likely to construe a criminal statute broadly in order to minimize the possibility that culpable defendants will slip through the cracks of a particular statute or of federal criminal law as a whole.

It is easy to see why this is so. Courts address interpretive questions in the context of an actual criminal prosecution. As such, they will be primarily concerned with making sure the case before them comes out “right”—which, in the case of morally blameworthy conduct, will almost invariably be taken to mean a conviction.¹⁸

¹⁸That is why federal mens rea doctrine forces courts to scrutinize the range of potential applications of criminal statutes. See infra note 128. Because courts see only the criminal cases that prosecutors want them to see—other cases never get filed or
Thus, separation of powers, federalism, and guaranteeing fair warning to defendants, the usual reasons for strictly construing criminal statutes, all take a back seat in the usual case to assisting prosecutors in convicting blameworthy defendants.

In other words, the courts' aversion to letting blameworthy conduct slip through the federal cracks has dramatically reversed the lenity presumption. The operative presumption in criminal cases today is that whenever the conduct in question is morally blameworthy, statutes should be broadly construed, in favor of the prosecution, unless the defendant's interpretation is compelled by the statute. Bluntly put, unless the statutory text compels the opposite result, the prosecution should always win unless there is a compelling reason (such as plain text or moral blamelessness) to rule in favor of the defendant. The rule of lenity, in short, has been converted from a rule about the proper locus of lawmaking power in the area of crime into what can only be described as a "rule of severity."

However sensible a rule of severity might seem in the abstract, it has serious problems of its own. First, it worsens the problem of federalization. A rule that criminal statutes should be broadly interpreted increases the amount of behavior that can be prosecuted end in guilty pleas—focusing on the case at hand can lead courts to miss the bigger picture, including the potential for disproportionate punishment. Evans is a nice illustration: the Court was so determined to expand the Hobbs Act to cover bribery that it overlooked the fact that its decision increased tenfold the penalty for gratuities offenses and considerably increased the penalty for bribery. See supra notes 61–69 and accompanying text.  

See supra note 52 and accompanying text.  

Contrast that presumption with the following statement of lenity: "when there are two rational readings of a criminal statute...we are to choose the harsher only when Congress has spoken in clear and definite language." McNally v. United States, 483 U.S. 350, 359–60 (1987). The demise of lenity can be seen in a number of appellate decisions specifically declaring that certain criminal statutes should be read broadly. See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985) (RICO); United States v. Jackson, 345 F.3d 638, 646 (8th Cir. 2003) (Continuing Criminal Enterprises); United States v. Colton, 231 F.3d 890, 903 (4th Cir. 2000) (bank fraud). The source of this doctrinal confusion is the Supreme Court. While sometimes faithfully applying the rule of lenity, the Court has more often either ignored lenity or dismissed it as a principle applicable only when legislative history and other interpretive principles cannot give meaning to an ambiguous statute. See, e.g., Holloway v. United States, 526 U.S. 1, 12 n.14 (1999). For a good descriptive account of the Supreme Court's schizophrenic case law on lenity, see Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 384–89.
in federal court. Under this rule, federal criminal law reaches not only the considerable amount of behavior that clearly falls within the terms of federal criminal statutes, but also the even larger universe of blameworthy behavior that can conceivably be made to fit within a federal crime.\textsuperscript{121} As Evans shows, it also increases redundancies across federal statutes. Federal statutes specifically criminalize bribery involving state and local officials only when there is a nexus between their activities and federal functions or programs, but Evans created an overlapping remedy under the Hobbs Act that can be used (and is used) to sidestep federal bribery statutes and bring into federal court state and local bribery with no federal nexus. The rule of severity thus translates into a broader and deeper federal criminal code.

Second, a broad-interpretation rule increases incentives for federal prosecutors to file charges in certain cases that otherwise might not be pursued in federal court. The key to understanding this point is recognizing that the courts’ penchant for broad interpretations increases both the likelihood of conviction and (in many cases) the potential punishment. If courts were less willing to expand criminal statutes, “visionary” prosecutions, such as Turkette and the “intangible rights” cases, which are not firmly grounded in existing statutes would be unlikely to succeed. The odds of success for the prosecution are considerably better—and the prosecutor’s power to extract guilty pleas from defendants even greater—when courts stand ready to expand criminal statutes. Prosecutors can bring visionary prosecutions secure in the knowledge that courts will usually stretch existing statutes if the prosecutor targets blameworthy defendants, and so there is every reason to expect more of those prosecutions to be brought federally. As Professor

\textsuperscript{121}“Intangible-rights” mail and wire fraud is a case in point. To say the least, it was far from clear from the face of the mail and wire fraud statutes that they covered, for example, corruption, political patronage, conflicts of interest, or breaches of fiduciary duty. Those results came about only as a result of expansive interpretations of those laws by prosecutors and courts: such misdeeds (and more) were imaginatively recast as schemes to deprive people of various “intangible rights,” including the right to “honest services” and “good government.” See generally John C. Coffee, Jr., From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics, 19 Am. Crim. L. Rev. 117 (1981). Although Congress subsequently ratified to some extent the intangible-rights doctrine, the only intangible right that is clearly reinstated is the “intangible right of honest services.” 18 U.S.C. § 1346 (2000).
John Jeffries has said: "Where judges stand ready to create new crimes (by attributing new meanings to pre-existing rubrics of common-law criminalization), police and prosecutors will bring them new crimes to create."\textsuperscript{122}

The willingness of the courts to construe statutes in ways that dramatically increase the penalty for the crime is another source of increased incentives to bring more of certain kinds of cases in federal court. When courts broadly construe criminal statutes carrying severe punishment (such as the Hobbs Act) to apply to conduct that is more leniently punished under other statutes, they drive up the potential punishment in those cases. Holding the likelihood of conviction constant, an increase in the potential punishment will tend to make a prosecution more attractive than it otherwise would have been,\textsuperscript{123} particularly in cases where the federal penalty is considerably higher than the penalties available under state law. In such circumstances, state law enforcement will have an incentive to refer state offenders for federal prosecution, and the need to cultivate good relations with state authorities may incline federal prosecutors to accept such referrals.\textsuperscript{124} Ironically, then, by straining to avoid the potential that blameworthy defendants will slip through the federal cracks, the federal courts are unintentionally making the problem of federalization worse.

Finally, the courts' willingness to construe criminal statutes broadly simply trades one blameworthiness problem (some culpable offenders potentially slipping through the federal cracks) for another (allowing punishment in excess of culpability). The trade is

\textsuperscript{122} Jeffries, supra note 117, at 222–23.
\textsuperscript{123} The argument assumes, of course, that prosecutors try to maximize the deterrence they get from their scarce prosecutorial resources, a common assumption among law-and-economics scholars. See, e.g., Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. Legal Stud. 289, 295–96 (1983). It would be "simplistic" to assume that "conviction maximization" is the driving force behind all real-world prosecutorial charging decisions. Daniel C. Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749, 751 (2004). Nevertheless, given that two key factors in deciding whether or not to prosecute will be the likelihood of conviction and the potential punishment, any increase in those factors will tend to make prosecution more likely.
\textsuperscript{124} A local police detective explained how his office decides which cases to send to federal or state court in these terms: "It's like buying a car: we're going to the place we feel we can get the best deal." Richman, supra note 36, at 95. On the relationship between federal and state law enforcers and the need of federal authorities for state cooperation, see id. at 91–96.
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a foolhardy one. Given the breadth and redundancy of federal criminal law, the risk that seriously culpable offenders will slip completely through the federal cracks is small, perhaps vanishingly so. The far more likely prospect is that an inability to convict under one federal statute will leave ample room for conviction under other federal statutes. Thus, a policy of interpreting statutes broadly is not necessary to guarantee that federal criminal law will reach seriously culpable behavior.

Even if it were, however, state criminal law would be the obvious fall-back for bad behavior that manages to slip through the federal cracks or receives disproportionately light punishment under federal law. State criminal law must be even broader than federal criminal law because state courts are the front lines in the war against crime. Moreover, state crimes, unlike their federal counterparts, are typically not limited in their application by jurisdictional triggering events. State crimes are usually defined simply in terms of the prohibited acts, without reference to the jurisdictional events, such as crossing state lines, using the mails, or affecting commerce, on which federal criminal jurisdiction usually depends. For these reasons, almost any federal crime that takes place outside of federal enclaves can be prosecuted in state court.

125 Needless to say, there are any number of state offenses that cannot be prosecuted in federal court unless they occur on federal enclaves. Some of these offenses may be minor (such as littering and traffic infractions), but others may be serious (such as drunk driving). These crimes will indeed fall through the federal cracks, but that is only because there are no federal statutes even remotely addressing such matters, which Congress has evidently chosen to leave to state law. The point in the text is that, within the category of crimes that are serious and that federal prosecutors would be interested in prosecuting federally, the risk of offenders slipping completely through the federal cracks is quite small.


127 This can be seen by examining existing patterns of federal prosecutions. Only a small percentage of federal prosecutions involve immigration or other matters in which federal jurisdiction is exclusive. The overwhelming majority involves fraud, drugs, and street crimes of the sort that every state prosecutes. See U.S. Sentencing Comm'n, 2002 Sourcebook of Federal Sentencing Statistics 11, 11 fig. A. Of course, federal prosecutors cannot compel state prosecutors to pursue state-court charges, but there would almost never be any need for such compulsion. As Daniel Richman has
the availability of state criminal law, a policy of broadly interpret-
ing federal criminal statutes is not necessary to ensure that culpa-
ble defendants receive criminal punishment.

Moreover, even if it is essential to make sure that federal prose-
cutors can convict all or virtually all culpable defendants, it makes
no sense to do so in a way that threatens disproportionately harsh
punishment. In a system, such as ours, that is based on limiting
guilt and punishment in accordance with moral blameworthiness,
imposing disproportionately severe penalties is not an acceptable
choice. If disproportionately severe penalties is the price to ensure that
culpable defendants do not slip through the federal cracks, then the
price is simply too high.

IV. HOW TO RESTORE PROPORTIONALITY TO FEDERAL CRIMINAL
LAW (AND COUNTERACT FEDERALIZATION IN THE PROCESS)

What is the solution to the problems identified in this Article? It
is for the courts to interpret criminal statutes with keen sensitivity
to the role that moral blameworthiness must play in delimiting the
amount of punishment that is imposed on convicted offenders.
Proportionality of punishment should no longer be treated as op-
tional or, even worse, irrelevant in federal cases; it is essential to
the moral credibility of the criminal law. Courts cannot continue to
expand crimes to ensure that nontrivial culpable acts will not slip
through the federal cracks. Only an integrated approach to propor-
tionality, one that draws upon all aspects of criminal-law doctrine,
can be effective in restoring a long-overdue sense of moral propor-
tion to federal criminal law and countering the steady drift of fed-
eralization toward broader liability rules and harsher penalties.
The following Sections present the various components of the inte-
grated interpretive approach advocated here.

A. Proportionality-Based Approaches to Statutory Construction

Courts should fundamentally rethink their current approach to
the interpretation of federal crimes. No longer should courts con-
strue crimes broadly, without regard to the consequences of their

shown, federal and state prosecutors have a cooperative relationship in which they
decide, through negotiation, which cases "go federal" and which stay "stateside." See
generally Richman, supra note 36, at 92.
decisions for proportionality of punishment. At a minimum, before expanding the reach of a criminal statute, courts should consider whether doing so will make it possible to impose disproportionate punishment on blameworthy offenders. This inquiry will require courts to look past the facts of the cases before them to hypothesize the range of potential applications of the statute, paying close attention to the penal consequences of an expansive interpretation.

Take federal mens rea doctrine first. The Supreme Court should make clear that avoiding the conviction of morally blameless conduct is not the only goal of mens rea requirements. A separate, equally vital goal is to ensure that the sanctions available in the event of conviction will be proportional to the blameworthiness of convicted offenders. Imposing punishment in excess of blameworthiness is just as offensive in principle as convicting blameless conduct: either way, courts are imposing punishment that is not justified by the culpability of the offender and gambling with the moral credibility of the criminal law. Crimes for which Congress has prescribed severe penalties should require correspondingly high levels of mens rea so that offenders will be seriously blameworthy and thus morally deserving of stiff penalties.

Courts should also take proportionality into account when construing the actus reus of federal crimes. As with mens rea selection, it is not enough to construe statutes narrowly when a broad interpretation might permit conviction of morally blameless conduct; courts must also weigh the penal consequences of expanding the statute. In the event that an expansive interpretation would threaten to visit disproportionate punishment on convicted offenders, as determined against the baseline of other criminal laws (state or federal) proscribing the same criminal act, a narrow reading is the appropriate response unless the plain meaning of the statute commands a broader interpretation. More specifically, before expanding an ambiguous statute to encompass a criminal act punished by other criminal laws of the same type, courts should con-

128 This hypothetical inquiry is exactly how the Supreme Court decides federal mens rea issues. See Wiley, supra note 4, at 1023 (explaining that courts deciding such issues start by asking "as a hypothetical matter whether morally blameless people could [be convicted]" on the government's interpretation).

129 The requirement that overlapping statutes be "of the same type" is an important limitation because it ensures that the penal comparison will be appropriate. In the ex-
sider whether the maximum penalties authorized by the statute are significantly higher than the penalties that would otherwise apply to that act under other federal statutes or, in cases that otherwise could not be prosecuted federally, state law. If they are, the statute should be narrowly interpreted so that the criminal act is subject to more appropriate levels of punishment under other statutes.\textsuperscript{150}

To illustrate this approach, consider \textit{Scheidler v. National Organization for Women.}\textsuperscript{131} \textit{Scheidler} was a civil RICO suit filed by abortion clinics and advocates of legalized abortion against abortion protesters who trespassed on clinic property and, in some cases, destroyed clinic property in order to disrupt their business. The case turned on whether interfering with the clinics' ability to conduct their business constituted extortion, a RICO predicate offense, because it deprived the clinics of their "intangible right" to conduct their business without outside interference. The Court offered a laundry list of reasons, including plain text and statutory history, for holding that such conduct is not extortion, and so \textit{Scheidler} was one of the rare cases in which it should have been clear from the statute that a broad interpretation was improper.

Predictably, \textit{not one} of the Justices saw that proportionality was a powerful independent basis for the Court's decision. While the abortion clinics were trying to expand the concept of "extortion" to cover disruptive abortion-clinic protests, Congress had responded to the controversy by passing the Freedom of Access to Clinic Entrances Act of 1994 ("FACE").\textsuperscript{132} Under FACE, abortion-protest activities of the type at issue in \textit{Scheidler}—which would have been felonies punishable by up to twenty years in prison under the Hobbs Act and criminal RICO violations had the abortion clinics

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\textsuperscript{150} Of course, to the extent that federal crimes unambiguously extend into areas traditionally regulated by state enforcers, as many federal gun and drug crimes do, there will be little room for interpretation. Any defendants prosecuted under those statutes will therefore be in federal court, not because of the interpretive strategies employed by the courts, but rather because of legislative and prosecutorial choices.

\textsuperscript{131} 537 U.S. 393 (2003).

prevailed—were graded as misdemeanors or, in the case of repeat offenses, minor felonies.\textsuperscript{133}

Of the eight Justices in the majority, only Justice Ruth Bader Ginsburg even thought the existence of FACE was relevant to the issues raised in \textit{Scheidler}. Nevertheless, even she misapprehended the statute’s relevance. In her view, FACE was relevant simply to show that expanding the Hobbs Act was unnecessary to prevent abortion protesters from slipping through the federal cracks.\textsuperscript{134} The real relevance of FACE, however, is that Congress specifically addressed the activities that gave rise to the \textit{Scheidler} litigation and prescribed much lower penalties.

Under the approach suggested here, \textit{Scheidler} would have been an easy case even if the Hobbs Act did not so plainly defeat application of the statute to protest activities. To construe a felony statute to encompass conduct that Congress specifically graded as a misdemeanor in another statute is bad enough. For a court to make conduct that Congress declared a misdemeanor (or, at most, a minor felony) a felony punishable by a maximum of \textit{twenty years’ imprisonment} and a criminal RICO violation—as Justice Stevens would have—would be nothing short of extraordinary. Given how courts usually interpret federal statutes, that position would have undoubtedly garnered more than a single vote had the statute not been so clearly in favor of the defendants. Courts, therefore, must be forced to pay attention to the effect their interpretation of statutes will have on the penal consequences facing defendants.

\textsuperscript{133} See id. § 248(b). The Justices also overlooked another compelling proportionality argument. Part of the majority’s statutory-history argument was that, under the New York law on which the Hobbs Act was modeled, interfering with the operation of a business would have constituted coercion, a crime distinct from extortion. \textit{Scheidler}, 537 U.S. at 405. The Justices attributed no significance to the fact, noted in a footnote quoting the New York statute, that coercion was merely a misdemeanor. Id. at 405 n.10.

\textsuperscript{134} See \textit{Scheidler}, 537 U.S. at 411 (Ginsburg, J., concurring) (“Congress crafted a statutory response that homes in on the problem of criminal activity at health care facilities. Thus, the principal effect of a decision against petitioners here would have been on other cases pursued under RICO.” (citations omitted)). Notice (1) her implicit assumption that there had to be a remedy within federal criminal law for protest activities even though trespassing, breaking and entering, and property destruction are crimes in every state of the union, and (2) her implicit suggestion that the absence of such a remedy in federal law might have warranted expanding the Hobbs Act to cover such activities.
B. From Severity Back to Lenity

That the federal courts are so often oblivious to the penal consequences of their interpretive decisions has important implications for the venerable, if beleaguered, rule of lenity. The rule of lenity has the distinction of being one of the few doctrines of the Marshall Court\(^{135}\) that has not achieved canonical status. Several noted scholars have forcefully argued in recent years that the rule should be abolished.\(^{136}\)

This Article suggests several potential new defenses for a reinvigorated rule of lenity. First, given that the erosion of lenity has resulted in what is effectively a rule of severity, it is far from clear that a neutral approach to the interpretation of criminal statutes is a realistic option. If rejecting lenity is equivalent to endorsing severity, then, unless one is prepared to sacrifice proportionality limits on punishment, the rule of lenity must not only be preserved but reinvigorated. Second, the track record of the courts in taking a federalized system of crime and making it broader and more punitive undermines the assumption made by lenity's critics that courts can reliably discern when criminal statutes should be narrowly construed. There is every reason to believe that courts will consistently get that determination wrong when the conduct in question is morally blameworthy. In light of these points, the time has come to rethink recent critiques of the rule of lenity and to appreciate the important role it can play in countering the senseless severity and breadth that is so characteristic of federalization.

1. In Practice, Rejecting Lenity is Tantamount to Endorsing Severity

The critics of lenity rightly reject the notion that federal criminal statutes should always be broadly construed and stress that a narrow interpretation will often be the right result. Kahan, for example, asserts that "federal criminal statutes should not uniformly be read either narrowly or broadly, but rather appropriately so as to carry out their purposes and to realize the full range of benefits as-

\(^{135}\) See United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).
\(^{136}\) John Jeffries and Dan Kahan are the leading proponents of this view. See Jeffries, supra note 117, at 189; Kahan, supra note 120, at 425.
The obvious assumption is that there is a viable interpretive middle ground between the lenity side of the spectrum (at which ambiguous statutes are narrowly construed) and the anti-lenity or severity side of the spectrum (at which such statutes are broadly construed). The middle ground for which critics of lenity aim is the following: statutes can be either broadly or narrowly construed depending on judicial balancing of the relevant policy considerations.

This middle ground may be attractive in theory, but it is evanescent at best in the real world in which courts operate. Given how often courts interpret criminal statutes expansively, it should be clear that courts do not simply let the weights in the policy scales determine whether statutes are to be read broadly or narrowly. Instead, the balance is heavily skewed in favor of the prosecution when the conduct in question is morally blameworthy, even when

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137 Kahan, supra note 120, at 426. Jeffries similarly argues that, although the rule of lenity is “simplistic and wrong,” there are three situations in which criminal statutes should be narrowly construed: when the interpretation sought by the prosecutor (1) would not be “consistent with legislative choice, either express or implied,” (2) would “threaten unfair surprise,” or (3) would “create[ ] or perpetuate[ ] openendedness in the criminal law.” Jeffries, supra note 117, at 219, 220–21; see also Kahan, supra note 120, at 415 (identifying situations in which statutes should be narrowly interpreted).

138 The distance between the two sides of the spectrum will vary depending on whether one adopts the strong or weak version of lenity. Under the strong version of lenity, the defendant wins unless the statutory text clearly says otherwise; that is, whenever there is any degree of ambiguity in a criminal statute, the court will resolve it against the prosecution. This version of lenity “embodies ‘the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.’” United States v. Bass, 404 U.S. 336, 348 (1971) (quoting Henry J. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967))). Under the weak version of lenity, however, the defendant does not necessarily win upon demonstrating that the statute is ambiguous. The critical question is whether the text is sufficiently ambiguous to justify resort to lenity. If the government’s reading is markedly better in light of statutory text or structure than the defendant’s, then the government’s interpretation should be adopted; otherwise, the defendant wins. In cases reading criminal statutes broadly, the Court has articulated an even weaker version of lenity under which lenity is “reserved . . . for those situations in which a reasonable doubt persists about a statute’s intended scope even after resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.” Moskal v. United States, 498 U.S. 103, 108 (1990) (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980))). This version of lenity is so weak that it is better viewed, in my opinion, as an anti-lenity rule. As Kahan says, “[r]anking lenity ‘last’ among interpretive conventions all but guarantees its irrelevance.” Kahan, supra note 120, at 386. My defense of lenity is limited to the weaker version described above.
the consequence of a broad interpretation is to allow prosecutors to drive up considerably the punishment that would otherwise apply. Whether the law-enforcement need for expanded authority is real or imagined, the one constant seems to be that courts will go to almost any lengths to keep blameworthy conduct from slipping through the cracks of federal criminal law and, indeed, of particular federal statutes. Thus, it is closer to the truth to say that the operative interpretive rule in federal criminal cases is severity: that ambiguous statutes presumptively should be broadly construed to prevent culpable defendants from slipping through the federal cracks.

This result should not be surprising. If indeed, as the critics of lenity argue, the problem with taking the rule of lenity seriously is that it "would render federal criminal statutes systematically underinclusive," then it is to be expected that judges would rarely see any reason to construe a statute narrowly when culpable conduct is at stake. To be sure, the potential for disproportionate punishment is a reason to interpret a criminal statute narrowly even when the conduct in question is morally blameworthy. As this Ar-

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140 Smith v. United States, 508 U.S. 223 (1993), is a case in point. There, the defendant sought to trade a machine gun for drugs. He was convicted of multiple drug offenses, and presumably could have been convicted of any number of serious firearms offenses as well. Suffice it to say that there was no danger that he or others who purchase drugs with guns (much less machine guns) would slip through the federal cracks. The prosecutor, however, argued that exchanging guns for drugs constitutes "use" of a firearm "during and in relation to a drug trafficking crime" pursuant to 18 U.S.C. § 924(c)(1) (2000). Smith, 508 U.S. at 226. One would think that such barter is not a terribly significant problem: even if trading guns for drugs is common, it would surely be the rare drug dealer whose access to firearms depends on bartering customers. The whole point of § 924(c) is that drug dealers are armed and highly dangerous. See Muscarello v. United States, 524 U.S. 125, 132 (1998) (describing the law as "an effort to combat the ‘dangerous combination’ of ‘drugs and guns’"). Nevertheless, Smith rejected the ordinary meaning of "using a gun" (which connotes employing the gun as a weapon) and endorsed the "universal view of the courts of appeals" that the statute encompasses barter with guns. Smith, 508 U.S. at 233. That the Court stretched the statute to convict is all the more remarkable given the draconian penal consequences of its interpretation: for having bartered with a machine gun, Smith faced a mandatory minimum sentence of thirty years, to run consecutively with his underlying drug convictions. Id. at 227.

141 Kahan, supra note 120, at 409.
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Article has shown, however, courts are blinded to the penal consequences of their interpretive decisions by culpability considerations.

Disregarding penal consequences leads more or less ineluctably to a broad-construction rule when morally culpable conduct is at stake. In such cases, there will be no risk of “unfair surprise”: societal expectations about the types of activities that are morally acceptable or lawful will have afforded ample notice that the defendant should not have acted as he did. Typically, broadly construing a statute does not result in what Jeffries calls “openendedness in the criminal law” but rather in an ascertainable rule of conduct that is broad in reach.\(^4\)

Even when a broad interpretation would produce an open-ended crime and the attendant risks of prosecutorial abuse and disproportionate punishment, courts still start from the premise that for every crime of any consequence there must be a remedy (or multiple remedies) in federal criminal law. This premise predictably leads courts to view openendedness in crimes as a price well worth paying to ensure that culpable offenders will not escape conviction in federal court.\(^3\) In practice, then, rejecting the rule of lenity tends to look a lot like endorsing anti-lenity (or a rule of severity), and that affords a substantial justification for taking lenity seriously even if an evenhanded approach to the interpretation of criminal statutes might otherwise be preferable to a strict-construction default.\(^2\)

\(^4\) For example, although the Court expansively construed the phrase “use of a firearm” in Smith, the law was just broader, not open-ended: any active use of a firearm, whether as a weapon, a commodity of exchange, or otherwise, counted. The breadth of the definition of “use” did not mean that the concept was limitless. See Bailey v. United States, 516 U.S. 137 (1995) (holding that storing a gun near drugs does not constitute “use” of a firearm). The paradigmatic example of an open-ended crime resulting from expansive judicial interpretation is mail and wire fraud. See Jeffries, supra note 117, at 239–42; see also supra Section III.B.3.

\(^3\) For proof, one need look no farther than mail and wire fraud. Courts have cut the concept of “fraud” loose from preexisting notions of fraud and allowed prosecutors to substitute in its place all sorts of imaginative “intangible rights.” The result has been federal prosecution of a dizzying array of misbehavior involving conflicts of interest, ethical lapses, and violations of workplace rules. See supra notes 57 & 121. To his credit, Jeffries condemns the courts’ approach to mail and wire fraud. Jeffries, supra note 117, at 239–42.

\(^2\) A strict-construction default can also be seen as consistent with congressional intent. Congress has opted out of lenity only in a few instances, usually in statutes au-
2. Courts Consistently Fail to Construe Criminal Statutes Narrowly to Avoid Dramatic Increases in Punishment

The second potential new defense of lenity suggested by this Article arises from the first. The critics of lenity necessarily assume that courts can reliably determine when it is appropriate to construe a criminal statute broadly and when a narrow construction is appropriate.\textsuperscript{145} Given the actual record of the courts in construing federal crimes, however, this assumption is, at best, dubious and, at worst, contrary to fact. Time and again, courts have construed federal crimes in ways that dramatically increase the punishment for criminal behavior above and beyond the usual punishment for that behavior under other federal criminal statutes or state law. The result is anything but sensible.

Two examples previously discussed illustrate the point. Prosecuting bribery under federal statutes specifically targeting bribery results in a penalty Congress deemed appropriate for bribery, but prosecuting that same act as “extortion” under the Hobbs Act results in up to double the maximum punishment.\textsuperscript{146} If a stick-up man and his getaway-car driver conspire to commit a couple of bank heists, whether they face the ordinary five-year penalty for conspiracy or the twenty-year penalty for “racketeering” under RICO depends entirely on how the Department of Justice chooses to proceed.\textsuperscript{147} Given that courts so often miss valid reasons for narrowly construing statutes, a consistently applied rule of lenity, under which every ambiguous criminal statute is read in favor of the defendant, begins to look much more attractive than the status quo.

\textsuperscript{145} Jeffries, for example, says that, in construing an ambiguous criminal statute, courts should weigh the advantages and disadvantages of a broad interpretation and “do whatever seems right” in the circumstances. Jeffries, supra note 117, at 221; see also Kahan, supra note 120, at 426 (arguing that statutes should be construed “appropriately” in light of their purposes).

\textsuperscript{146} See supra notes 56–64 and accompanying text.

\textsuperscript{147} See supra notes 82–84 and accompanying text.
Reconceptualizing the rule of lenity as a check on disproportionate criminal penalties in the federal system, as suggested here, would restore the doctrine to a solid foundation in the policies that gave rise to its creation in early English common law. The English courts created the rule of lenity to ameliorate what Jeffries rightly terms the "legislative blood lust of eighteenth-century England." At that time, almost all felonies were capital offenses, and because judges lacked discretion to sentence persons convicted of such felonies to any penalty other than death, the rule of lenity was essential to counteract the "unmitigated severity" of criminal sanctions. Unlike contemporary federal judges, their English forbears understood all too well the importance of paying close attention to the penal consequences of their interpretive decisions. The English judges also understood, as their modern counterparts on the federal bench do not, that proportionality of punishment is no less essential to the just imposition of punishment than the presence of moral blameworthiness. This is why the English courts adopted interpretive strategies that would mitigate, not exacerbate, the severity of the criminal sanctions that had been authorized by Parliament.

Today, although mandatory capital punishment is a thing of the past, unwarranted severity in penal sanctions and limited sentencing discretion are as characteristic of contemporary federal criminal practice as they were of its antecedent in English common law. Legislatively mandated minimum sentences, rigid federal sentencing guidelines recognizing only a small number of grounds for downward departures, the abolition of parole for federal prison-

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148 Jeffries, supra note 117, at 198.
149 Livingston Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 750 (1935). The rule of lenity, though originally one of several means of averting unjust executions, became increasingly important as Parliament passed statutes making particular felonies "nonclergyable." Benefit of clergy, a judicial doctrine which spared convicted felons of the death penalty if they could pass a literacy test (something that, in the Middle Ages, few people other than clergy could do), had been an early effort to limit capital punishment. Parliament, however, started abrogating the doctrine as "the growing literacy among laymen in the latter part of the 14th century made a considerable number of them eligible to claim it." Id. at 749. The abrogation of benefit of clergy made lenity even more essential to counteract excessive reliance on capital punishment, a problem Parliament did not address until the nineteenth century when the death penalty ceased to be the usual penalty for felonies. Id. at 751.
ers,\textsuperscript{150} and ever-increasing statutory maximums make this abundantly clear. Now, factor in the ways courts unwittingly yet unmistakably make federal criminal sanctions even harsher: they broadly construe federal crimes (thereby empowering prosecutors to shift defendants from the more lenient state system into federal court and drive up the penalties available in federal court) and allow prosecutors to pick and choose among overlapping statutes carrying different penalties. Consequently, the rule of lenity remains necessary today as a mechanism for mitigating the severity of existing criminal sanctions.

3. Taking Lenity Seriously Would Help Counteract Disproportionate Federal Penalties

Any real-world justification for lenity, such as the ones offered above, must address Professor William Stuntz's recent critique of the rule of lenity. Unlike Jeffries and Kahan, Stuntz does not attack lenity on theoretical grounds; instead, he argues that taking lenity seriously would be pointless given what he calls the "deep politics" of federal criminal law.\textsuperscript{151} In his view, if courts enforced the rule of lenity, Congress would respond by writing clearer and broader criminal statutes and by overruling decisions that narrowly interpret criminal statutes.\textsuperscript{152} Stuntz deserves credit for asking the right question. The question is not whether, as an abstract matter, lenity or some other interpretive posture is the right one; it is, rather, what interpretive strategy makes the most sense in our current federalized system of crime.

Although Stuntz asks the right question, his answer is unconvincing. On the first point, lenity need not lead to any change in how Congress defines many crimes. As Stuntz says elsewhere in his fascinating article on the political economy of criminal law, many federal crimes are "symbolic" only and "generate very few federal prosecutions."\textsuperscript{153} For such crimes, the rule of lenity should have no effect on legislative draftsmanship: the symbolic statement is made, legislators can take credit for being "tough" on crime, and they can

\begin{footnotes}
\item[151] Stuntz, Pathological Politics, supra note 2, at 510.
\item[152] Id. at 561–65.
\item[153] Id. at 546.
\end{footnotes}
move on to other kinds of rent-seeking with higher potential payoffs. Even for crimes that are likely to be prosecuted frequently, a strategy of anticipating and resolving interpretive questions in favor of the government will often, in practice, be ineffective. The problem of ambiguity in criminal statutes is not just inartful crime definition (although that assuredly is a problem), but also that it can be difficult to foresee the many interpretive questions that will arise in real-world prosecutions.

Consider, for example, RICO. RICO was the product of an unusually deliberative, years-long effort by Congress, in close cooperation with the Department of Justice, to craft an innovative remedy against organized crime. At the conclusion of this historic effort, Congress enacted a statute premised on an approach (striking at racketeers when they infiltrate businesses and other legitimate “enterprises”) that, within a few short years, was all but abandoned by federal prosecutors in favor of an entirely unforeseen approach (using RICO against mafia families and other purely illegitimate “enterprises”). If Congress does such a poor job at predicting the future when, as in the case of RICO, it really matters and Congress is actually trying to get the policy right (instead of just making symbolic statements for reelection campaigns), there is little room for confidence that Congress could, even if it wanted to, anticipate and address (in clear and unambiguous terms, no less) many future interpretive questions when enacting a new crime.

154 See supra notes 86-90 and accompanying text.

155 One might argue that the difficulty of greater ex ante specificity in defining crimes cuts in favor of allowing Congress to delegate crime-definition power to the courts. See Kahan, supra note 120. The problem with this argument is that it ignores the context in which interpretive questions arise in federal criminal cases. Given the breadth and redundancy of the federal criminal code, the risk of any nontrivial criminal behavior completely evading federal prosecution is remote. Almost invariably, the question is not whether such behavior can be prosecuted federally, but rather just how many different statutes it can be prosecuted under and how stiff the penalty will be upon conviction. The danger that federal criminal statutes might not reach any substantial crime is thus small. (This may explain why Congress has opted out of the rule of lenity in only a few instances. See supra note 144.) The danger melts completely away when the two-tiered structure of the American criminal justice system is taken into account. Federal criminal law is not the sole, or even major, line of defense in the fight against crime; state criminal law is. It is significant that many states have rejected the rule of lenity, thereby allowing their courts to expand state crimes where necessary to catch criminals who might otherwise escape punishment. See generally
In any case, more specificity up front might not be the disaster that Stuntz fears, for it might actually lead to less criminalization rather than more. Take, for example, the Mann Act.\footnote{Mann Act, 18 U.S.C. § 2421 (2000).} If Congress had been forced to replace the vague catch-all provision criminalizing interstate transportation for "any... immoral purpose"\footnote{Id.} with specific language giving notice that the bill would literally make felons of unfaithful spouses and teenagers who "go too far" on a date, it is not at all clear that the bill would have passed. After all, the legislation was packaged, intentionally and perhaps deceptively, as a measure aimed only at forcible "trafficking" in females.\footnote{See supra notes 38–40 and accompanying text. The packaging may have been deceptive because, after reviewing the decision in \textit{Caminetti v. United States}, 242 U.S. 470 (1917), Congressman Mann wrote the author of the majority opinion congratulating him for "constru[ing] the law the way I intended" and stating that, despite the statements of limited purpose in the House committee report (which the \textit{Caminetti} dissent had stressed), "I explained to a good many Members the bill as going fully as far as is stated in your valuable opinion," Langum, supra note 45, at 119.}

In this connection, note that in 1948 Congress repealed the federal enclave statutes that specifically criminalized adultery and fornication, but left the Mann Act, which covered the same behavior not just on federal enclaves but nationwide, unchanged until the 1980s.\footnote{Id.} Why the difference? A plausible explanation would seem to be that, although Congress intended to decriminalize adultery and fornication back in the 1940s, it overlooked the fact that the Mann Act covered that same behavior because the Act referred vaguely to "white slavery" and transportation for "any... immoral..."\footnote{See supra note 46.}
purpose” instead of adultery and fornication specifically. This would suggest that, in some contexts, specific language apprising members of Congress precisely what they are criminalizing may lead to less criminalization.

As for the point about overrulings, Stuntz’s argument proves too much: if he is right that lenity is pointless because of the likelihood of legislative overrides, then any effort to construe crimes narrowly is pointless. In that case, his claim ought to be that courts should always construe crimes broadly, a position that, sensibly, neither he nor lenity’s critics take. The more fundamental response is that, although narrow interpretations are surely more likely to be overruled than interpretations favoring the government, most decisions narrowly interpreting criminal statutes are not in fact overruled. As Stuntz himself notes: “[B]etween 1978 and 1984, the Supreme Court decided thirty-four cases interpreting criminal statutes unfavorably to criminal defendants. Congress overturned only one of those cases. Meanwhile, during the same period, Congress overruled five of twenty-four decisions unfavorable to the federal government.”

These data indicate that close to eighty percent of the narrow interpretations surveyed were not overruled.

This is cause for optimism, not pessimism, about the potential for lenity to avoid disproportionate penalties and make serious inroads on federalization. The data suggest that legislative inertia, if nothing else, will preserve many of the gains produced by narrow interpretations, and those gains (unlike the gains from broad interpretations) are ones that, no matter how sensible, the legislative process cannot be counted upon to deliver. With those odds, lenity is a good bet—one well worth taking to counteract the potential that broad interpretations of federal statutes will dramatically in-

\[160\] Stuntz, Pathological Politics, supra note 2, at 562 n.214 (citations omitted). See generally William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 344 tbl.4, 345 (1991). The data show, as theory would predict, that the Department of Justice is the party in the best position to overcome legislative inertia and obtain congressional clarification of ambiguities in criminal statutes. The rule of lenity—which, functionally speaking, puts the burden on the Justice Department to get clarifying legislation from Congress—thus is the sensible response to the political economy of federal criminal law. For an excellent argument along these lines, see Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 Colum. L. Rev. 2162, 2194 (2002).
crease the penalties federal defendants will face and to prevent courts from worsening the problem of federalization.

C. Statutory Exclusivity

The reforms discussed above all address the common situation in which federal criminal statutes are ambiguous and thus, as a textual matter, can reasonably be read either broadly or narrowly. These interpretive strategies, functionally speaking, serve as clear-statement rules requiring Congress to make clear when it intends to drive up the penalty for crimes that otherwise receive lesser punishment or to expand the reach of particular crimes. Congress would thus retain ultimate control over the definition of federal crimes and over how severely they are punished.

One additional reform is necessary to address the situation in which a number of overlapping statutes apply to the same basic crime: making specific criminal statutes addressing the same crime exclusive of more general statutes. The problem here is not that the statutes are ambiguous; it is that a number of statutes apply to same criminal act. The example given earlier was fraud, but the point is easily generalizable: When multiple criminal laws regulate the same criminal act but provide different penalties or define the crime differently, allowing prosecutors to pick and choose among the statutes as they see fit allows them to override legislative policy choices concerning crime definition and the proper penalty for a criminal act.

This problem can and should be solved by adopting a principle of statutory exclusivity to address the redundancy of the federal code. Under this approach, when multiple statutes of the same type apply to the same act or omission, prosecutors would be required to proceed under the most specific statute applicable to that act to the exclusion of more general crimes. This would be so even if it

\[\text{161 See supra Section III.B.3.} \]
\[\text{162 For the implications of the “same type” limitation, see supra note 129.} \]
\[\text{163 This approach would be justified by a longstanding principle of statutory interpretation: “As always, [w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment.” Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987) (internal quotation marks omitted) (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976)). This principle is consistent with two analogous holdings that} \]
means that the prosecution would fail because of how Congress defined the most specific crime.

To illustrate how the exclusivity approach would work, consider a prosecution involving the fraudulent use of credit cards. Although mail and wire fraud could, as a literal matter, apply, the credit-card fraud statute would be the more specific statute because it applies to a subset of frauds orchestrated through the use of the mails and wires—namely, frauds involving credit cards. Consequently, the credit-card fraud statute would be the exclusive basis for prosecuting that act. This would cut in half the maximum punishment of twenty years for mail and wire fraud.164

Notice that if the amount of the fraud were below the monetary threshold specified in the credit-card statute, no federal fraud statute could be used because the prosecutor would be limited to the credit-card statute yet unable to prove a necessary element for conviction under that statute. In that event, the prosecutor would have two choices: either charge the defendant for a different criminal act or omission (assuming there is one), or leave the defendant to potential prosecution in state court. As this example demonstrates, an exclusivity approach would prevent federal prosecutors from using charge-selection to evade congressional policy choices about the definition of federal crimes or to drive up the maximum

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punishment above the level Congress prescribed in the most specific applicable statute.\textsuperscript{165}

In many cases, the exclusivity approach will result in a lower maximum penalty, sometimes even a dramatically lower penalty. As an example, requiring prosecutors to use the federal-official extortion statute instead of the Hobbs Act when prosecuting a federal employee for official-right extortion would lower the available punishment from a maximum of twenty years to three.\textsuperscript{166} It is important to note, however, that exclusivity will not invariably result in lesser punishment. Where the crimes carry the same maximum punishment, the choice as to which crime to charge may make no difference to the sentence the defendant faces. This would be the case, for instance, if either mail and wire fraud or securities fraud were used to prosecute fraud in the purchase or sale of securities, because both sets of fraud statutes carry maximums of twenty years.\textsuperscript{167}

\textsuperscript{165} Cases may arise in which it is unclear which of two potentially applicable crimes of the same type is the more specific. When it is unclear which statute should be the exclusive remedy, it makes sense to err on the side of caution and require use of the statute carrying the lower penalty. To be sure, this tie-breaker rule resolves ambiguous cases according to a substantive bias (avoiding potentially disproportionate punishment), but that is unexceptional. Many recognized interpretive canons do precisely that. See generally William N. Eskridge, Jr., et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 848–908 (3d ed. 2001) (discussing the rule of lenity and other examples). For an overview of the normative debate over substantive canons, see id. at 914–16.

\textsuperscript{166} Compare 18 U.S.C. § 872 (2000) (federal-official extortion), with id. § 1951 (Hobbs Act). Section 872 is the more specific statute because it applies only to one kind of extortion (extortion under color of public office) by one kind of officeholder (federal officials), whereas the Hobbs Act applies to any kind of extortion (by means of public office or of wrongful force, violence, or fear) by any public official (federal, state, or local) and, in the case of official-right extortion, private individuals acting under pretense of public office. See supra note 99 and accompanying text. Similarly, disallowing use of mail and wire fraud to punish violations of the False Claims Act would lower the maximum penalty from twenty years to five. See 18 U.S.C. § 287. The Act is the more specific crime because it applies to a particular subset of potential fraud victims (federal agencies) and to one particular way of defrauding federal agencies (submitting false claims for payment). Finally, if remitted to the health-care fraud statute instead of mail and wire fraud, for example, the maximum penalty drops from twenty years to ten. See id. § 1347 (health-care fraud). Section 1347 is more specific than mail or wire fraud because it applies only to fraudulent activity aimed at a particular class of victims (federal health-care agencies).

\textsuperscript{167} Even when the choice between two crimes does not affect the maximum sentence, it may nevertheless have a significant effect on the potential sentence. If two crimes carry the same maximum punishment but one of them has a mandatory mini-
In some cases, however, exclusivity will actually require the prosecutor to use the statute carrying the higher punishment. For example, if a defendant mails in a materially false credit application to a federally insured bank, the bank-fraud statute would be the most specific statute as compared to mail or wire fraud. Bank fraud, however, is punishable by up to thirty years in prison versus the twenty-year maximum for mail and wire fraud.188

The fact that, in cases such as these, an exclusivity approach will not produce lower sentences is not problematic from the perspective of avoiding disproportionately severe punishment. In many such cases, there is no lessening of potential punishment, but, at the same time, there is no increase either; the exposure of defendants in such cases is the same under an exclusivity approach as under current law. Though exclusivity produces no proportionality gain (or loss) in these situations, in many other situations it will substantially lower the penalty the defendant faces by remitting prosecutors to statutes under which Congress prescribed lesser penalties. Furthermore, in cases such as the earlier example of credit-card fraud below the prescribed monetary threshold, where limitations in the definition of the most specific statute preclude federal conviction, exclusivity would mean that the criminal act could only be prosecuted in state court, where more lenient and more flexible sentencing policies typically apply.169 As a whole, then, defendants would be much better off under the exclusivity approach than under current law.

168 Compare 18 U.S.C. § 1014 (Supp. 2002) (bank fraud), with id. §§ 1341, 1343 (mail and wire fraud, respectively). Also, a number of crimes, such as RICO, contain their own conspiracy prohibitions, which are punished more severely than the five years authorized under the general conspiracy statute. See 18 U.S.C. § 1963 (2000) (providing twenty-year penalty for conspiracies to violate RICO). These conspiracy provisions, though more severe, would be more specific than the general conspiracy statute and would thus govern under the exclusivity approach.

169 See supra notes 115–116 and accompanying text.
More fundamentally, the approach outlined in this Article does not presume, in cases of overlapping statutes carrying different penalties, that the lower penalty is invariably "right" and the higher one "wrong." There would be no basis for such a presumption. The presumption instead is that the more specific the crime is, the more likely it is that the legislature understood the range of behaviors that it was criminalizing and thus that the punishment the legislature prescribed will be proportional to those behaviors.

The risk of disproportionate punishment is at its greatest when a statute covers a wide range of behavior of differing levels of culpability and behavior that is poorly defined. In those situations, the legislature may well prescribe a stiff penalty that, although appropriate for more culpable kinds of behavior covered by the statute, may well be excessive as to other kinds of behavior that is less evidently covered or that is covered only because of later expansive interpretations by courts. The contention here is that the goal of proportionality in punishment is best served overall by requiring prosecutors to proceed under the most specific applicable statute even if that statute may, in certain contexts, carry a severe penalty. After all, serious crimes should carry severe penalties. The objection is not to severe penalties but rather to disproportionately severe penalties—penalties in excess of the blameworthiness of the

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170 Consider the 2002 increase of the penalties for mail and wire fraud from five to twenty years. The stated motivation for the increases was the corporate accounting scandals that rocked Wall Street over the past few years, driving even Fortune 500 companies into bankruptcy and costing thousands of employees their jobs. The paradigm Congress had in mind in quadrupling the punishment for mail and wire fraud was massive, sophisticated frauds like Enron. Because use of mail and wire facilities is ubiquitous and prosecutors are free under current law to pick and choose among applicable statutes as they see fit, the huge increase in the penalty for mail and wire fraud does not simply increase the penalty for massive corporate frauds; it essentially makes the maximum punishment for every fraud that can be prosecuted federally at least twenty years. Similarly, the twenty-year maximum for robbery and extortion under the Hobbs Act makes sense when the paradigm is the use of violence or other seriously wrongful means to force people to surrender their money or property; it made far less sense when the meaning of "extortion" was stretched decades later to include bribery (a serious but less severely punished crime), and no sense whatsoever when applied to the minor felony of illegal-gratuities offenses. See supra Sections III.A.2, III.B.3.
criminal act, as measured by the penalties specified in the most specific applicable statute.\footnote{This approach may be consistent with legislative intent. The power to pick and choose among overlapping crimes empowers prosecutors to override one of the most basic policy judgments that Congress makes when adding to the criminal code: the extent of punishment that a criminal act deserves. When Congress assigns a penalty for a particular criminal act, it presumably prescribes the full amount of the punishment it intends to authorize and thus implicitly decides that additional punishment is not warranted. Having made that decision, it is far from self-evident that Congress would want to allow prosecutors to use generic statutes carrying higher penalties to drive up the punishment that Congress deemed appropriate for the precise act.}

CONCLUSION

Proportionality of punishment is in serious jeopardy in the federal system. Many scholars attribute the blame for that unjust state of affairs, and for federalization more generally, to Congress. Closer inspection, however, reveals a considerably different story, one that is not so charitable to the judiciary. The federal courts are not innocent bystanders watching helplessly as Congress and the Department of Justice federalize crime and ratchet up punishments for federal defendants. Instead, the courts have been playing the federalization game right along with the political branches—unwittingly, perhaps, but playing all the same—by expansively construing federal crimes without regard to the penal consequences of doing so. The federal criminal code is as broad and harsh as it is today in large part because the federal courts helped make it that way.

The approach the courts have taken in case after case is as predictable as its results have been misguided and, at times, tragic. The courts are motivated by the view that their role is to ensure that no defendant who has committed a morally blameworthy act will slip through the federal cracks. As a result, courts have consistently construed criminal statutes expansively, extending both the scope and the redundancy of the federal criminal code. By broadly construing criminal statutes, the courts have allowed federal prosecutors to shift offenders who otherwise would have received more lenient sentences in state court into the far more rigid and punitive federal system. Moreover, the courts have allowed prosecutors to treat the penalty prescribed in specific criminal statutes as merely
an "opening bid" in an attempt to secure the highest possible sentence. By this I mean that even where a federal statute specifically applies to a particular criminal act, the courts have often broadly construed more general overlapping statutes carrying higher penalties to encompass the act, thereby driving up the punishment that Congress specifically prescribed for that act.

Through these means, the courts have achieved the protection they (and prosecutors) wanted against culpable defendants slipping through the federal cracks, but at a very high price indeed—both to themselves and, more importantly, the people they imprison and the families left behind. The courts have expanded the breadth and depth of the federal criminal code and given prosecutors license to exploit it as they see fit and to transform their local U.S. district court into what one judge has aptly described as "a 'police court' where judges are under 'constant pressure to keep cases moving as fast as possible.'"\footnote{Sanford H. Kadish, Comment, The Folly of Overfederalization, 46 Hastings L.J. 1247, 1250–51 (1995) (quoting remarks by Chief Judge Judith Keep of the United States District Court for the Southern District of California).} To make sure the blameworthy do not get away, the courts have often allowed the guilty to be punished in excess of blameworthiness and opened the floodgates to federal criminal cases. Disproportionate punishment and crushing criminal dockets are now a common feature of the federal criminal landscape, and relief is nowhere in sight.

Amazingly, given the widely recognized importance of proportionality in criminal law theory, there is virtually no protection under current law against disproportionately severe criminal penalties. At the front end of the criminal process, courts regularly expand the reach of federal statutes and, in doing so, drive up the penalties federal defendants face. At the back end of the process, the federal sentencing guidelines and legislative mandatory minimum sentences take away any meaningful judicial sentencing discretion, which might otherwise be used to tailor the punishment to "fit" the crime, and constitutional proportionality review is essentially an empty promise outside the capital context. There is, in short, only one guaranteed pathway to leniency in the federal system these days, and that is to plead guilty—a state of affairs that should be as troubling to us as it is pleasing to prosecutors.
Although proportionality may not be ideal as a constitutional standard for terms of imprisonment, courts can and should use statutory interpretation to avoid the potential for disproportional federal sanctions. This Article has proposed several interpretive strategies that would do so and, in the process, help counteract federalization. If broadly interpreting an ambiguous statute would significantly drive up the punishment for a criminal act, then that is just as compelling a reason to read the statute narrowly as is the potential for punishing blameless conduct. In cases where multiple statutes clearly apply to the same criminal act—the paradigm here is the multiplicity of federal fraud statutes—courts should require prosecutors to proceed under the most specific applicable statute in order to prevent prosecutors from exploiting the redundancy of the federal criminal code to drive up the punishment Congress prescribed for the offense committed by the defendant. To the extent courts continue to sacrifice proportionality concerns in order to ensure that blameworthy offenders do not slip through the federal cracks, a consistently applied rule of lenity is the only realistic solution.

These solutions would go a long way toward promoting proportionality of punishment and counteracting the growing breadth and depth of the federal criminal code. I harbor no illusion, however, that they would completely solve the problems associated with federalization. A complete solution will ultimately depend on Congress exercising greater restraint in the use of its power to enact crimes and showing greater respect for the primacy of the states in fighting crime. Unless all that happens, we will necessarily be in a second-best world (or worse). In my view, however, that world need not be the rather bleak "world in which the law on the books makes everyone a felon"\textsuperscript{173} and prosecutorial decisions about who goes to prison and for how long largely go unchecked.

If, indeed, we are on the way to that world—and, regrettably, every indication is that we are—the federal courts cannot lay the blame entirely at the doorstep of the other branches. The judiciary bears a fair share of the blame for the interpretive strategies it employs in criminal cases. That is the bad news. The good news is that if federal courts rediscover the virtues of narrowly construing

\textsuperscript{173} Stuntz, Pathological Politics, supra note 2, at 511.
criminal statutes and, more generally, of firmly grounding criminal punishment in moral blameworthiness, even a federalized system of crime may not be so bad after all. If that prediction turns out to be wrong, then the fault for the problems associated with federalization truly will lie elsewhere.